No. 14-1458

Title: MHN Government Services, Inc., et al., Petitioners
v.
Thomas Zaborowski, et al.

Docketed: June 12, 2015

Linked with 14A1031

Lower Ct: United States Court of Appeals for the Ninth Circuit

Case Nos.: (13-15671)

Decision Date: December 17, 2014

Rehearing Denied: February 9, 2015

Questions Presented

--Date--	------Proceedings and Orders----------
Apr 3 2015	Application (14A1031) to extend the time to file a petition for a writ of certiorari from May 10, 2015 to June 10, 2015, submitted to Justice Kennedy.
Apr 8 2015	Application (14A1031) granted by Justice Kennedy extending the time to file until June 10, 2015.
Jun 10 2015	Petition for a writ of certiorari filed. (Response due July 13, 2015)
Jul 1 2015	Waiver of right of respondents Thomas Zaborowski, et al. to respond filed.
Jul 10 2015	Brief amici curiae of Atlantic Legal Foundation, and The International Association of Defense Counsel filed.
Jul 13 2015	Brief amicus curiae of Pacific Legal Foundation filed. (Distributed)
Jul 13 2015	Brief amici curiae of Mary A. Bedikian, Daniel Barnhizer and George T. Roumell, Jr. filed. (Distributed)
Jul 15 2015	DISTRIBUTED for Conference of September 28, 2015.
Jul 23 2015	Response Requested. (Due August 24, 2015)
Aug 24 2015	Brief of respondents Thomas Zaborowski, et al. in opposition filed.
Sep 8 2015	Reply of petitioners MHN Government Services, Inc., et al. filed. (Distributed)
Sep 9 2015	DISTRIBUTED for Conference of September 28, 2015.
Oct 1 2015	Petition GRANTED.
Oct 23 2015	The time to file the joint appendix and petitioners' brief on the merits is extended to and including November 25, 2015.
Oct 23 2015	The time to file respondents' brief on the merits is extended to and including January 8, 2016.
Nov 2 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the respondents.
Nov 5 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the petitioners.
Nov 25 2015	Joint appendix filed.
Nov 25 2015	Brief of petitioners MHN Government Services, Inc., et al. filed.

Dec 2 2015	Brief amicus curiae of Equal Employment Advisory Council filed.
Dec 2 2015	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Dec 2 2015	Brief amicus curiae of The Employers Group filed.
Dec 2 2015	Brief amicus curiae of Pacific Legal Foundation filed.
Dec 2 2015	Brief amici curiae of Atlantic Legal Foundation, and The International Association of Defense Counsel filed.
Dec 2 2015	Brief amicus curiae of DRI - The Voice of the Defense Bar filed.
Dec 23 2015	SET FOR ARGUMENT on Wednesday, February 24, 2016
Dec 30 2015	The time to file respondents' brief on the merits is further extended to and including January 15, 2016.
Jan 7 2016	Letter from counsel for the petitioners received.
Jan 7 2016	CASE REMOVED FROM ARGUMENT CALENDAR for Wednesday, February 24, 2016.
Apr 8 2016	Motion to dismiss the writ of certiorari pursuant to Rule 46 received.
Apr 11 2016	Letter of consent to the motion to dismiss the writ of certiorari pursuant to Rule 46 received.
Apr 12 2016	Petition Dismissed - Rule 46.

Supreme Court, U.S.
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14-1458

No. 14-

IN THE

Supreme Court of the United States

MHN GOVERNMENT SERVICES, INC., AND MANAGED HEALTH NETWORK, INC.,

Petitioners,

v.

THOMAS ZABOROWSKI, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Arbitration Act ("FAA") provides that an arbitration agreement shall be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2. California law applies one rule of contract severability to contracts in general, and a separate rule of contract severability to agreements to arbitrate. The arbitration-only rule disfavors arbitration and applies even when the agreement contains an express severability clause. Its application in this case conflicts with binding precedent of this Court and with opinions of four other courts of appeals.

The question presented is whether California's arbitration-only severability rule is preempted by the FAA.

CORPORATE DISCLOSURE STATEMENT

Petitioner MHN Government Services, Inc. is a wholly owned subsidiary of MHN Services. MHN Services is a wholly owned subsidiary of Petitioner Managed Health Network, Inc. Petitioner Managed Health Network, Inc. is a wholly owned subsidiary of Health Net, Inc., a publicly held corporation.

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INTRODUCTION

Agreements to arbitrate can no longer be treated as the disfavored outcasts of the contract world. In *AT&T Mobility LLC v. Concepcion*, this Court held that the Federal Arbitration Act ("FAA") means exactly what it says: Agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 131 S. Ct. 1740, 1745 (2011) (quoting 9 U.S.C. § 2). The FAA preempts not only state laws that expressly disfavor arbitration agreements, but also state-law rules that purport to apply to all contracts but actually "have a disproportionate impact on arbitration agreements." *Id.* at 1747. Likewise, the FAA preempts "generally applicable contract defense[s]," that apply, in practice, "only to arbitration" or that "derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1746.

In the present case, the parties agreed to arbitrate their disputes, and they further agreed that if any specific terms of the agreement were invalid, a court should simply excise the offending terms and still honor the parties' agreement. For contracts generally, California courts honor the parties' stated preference of severing invalid terms, as opposed to invalidating the entire agreement. They take a very pro-contract-enforcement stance, severing unconscionable or invalid terms unless doing so would be impossible without rewriting the agreement or unless the core purpose of the agreement is illegal. Quite a different rule applies, however, for agreements to arbitrate. California courts show a clear preference against enforcing an agreement to arbitrate. They hold that the existence

of more than one invalid provision can be read by a court to automatically indicate that the stronger party sought to use arbitration not simply as an alternative to litigation, but as a tool to steamroll the weaker party. The court can therefore refuse severance and, instead, simply invalidate the entire agreement to arbitrate.

This arbitration-only anti-severance rule persists despite this Court's holding that the FAA preempts state-law contract defenses that "have a disproportionate impact on arbitration agreements," or that apply, in practice, "only to arbitration." *Id.* at 1746-47. In refusing to hold the California rule preempted, the Ninth Circuit majority ignored binding precedent from this Court and brought itself into conflict with at least four other courts of appeals.

This is not a one-time problem. California courts routinely display the flagrant hostility to arbitration that the FAA was designed to end. The Ninth Circuit routinely allows this to occur. And the severability issue presented here arises literally every time a court finds one or more provisions of an arbitration agreement to be invalid under California law. This Court's review is necessary to resolve the split of authority and to uphold the supremacy of federal law. The petition should be granted.

OPINIONS BELOW

The district court's opinion (Pet. App. 12a-30a) is published at 936 F. Supp. 2d 1145. The Ninth Circuit's divided panel decision (Pet. App. 1a-11a) is not published in the *Federal Reporter*, but is available at

2014 WL 7174222 (Dec. 17, 2014). The Ninth Circuit's order denying rehearing en banc (Pet. App. 31a) is unpublished.

JURISDICTION

The Ninth Circuit denied rehearing and rehearing en banc on February 9, 2015. Pet. App. 31a. Subsequently, Justice Kennedy extended the time for filing a petition for a writ of certiorari to June 10, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, Art. VI, Cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA") provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract

> or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

STATEMENT OF THE CASE

Respondents Join Petitioners' Military Consulting Program.

Petitioners are military contractors. They partner with the U.S. Department of Defense to provide military service members and their families access to a global network of highly experienced, licensed consultants who offer confidential life-skills counseling. ER 449.[1] These consultants offer short-term, non-medical, financial, child services, and victim-advocacy counseling at U.S. military installations around the world. Pet. App. 12a-13a. The consultants are independent, highly trained professionals. To qualify, applicants must hold graduate degrees and professional licenses that require advanced training. ER 449. Respondents Thomas Zaborowski and Vanessa Baldini

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[1] "ER" refers to the Excerpts of Record filed with the Ninth Circuit.

joined Petitioners' network as consultants. Pet. App. 12a.

Respondents Enter Into An Arbitration Agreement With Petitioners.

Prior to joining Petitioners' network, Zaborowski and Baldini reviewed and signed a contract called a Provider Services Task Order Agreement. *Id.* at 33a-60a. As part of this contract, both agreed to arbitrate any disputes. Captioned "**Mandatory Arbitration**" in bold underlined text, and written in the same typeface and typesize as the rest of the contract, the arbitration clause provides, in full:

> **Mandatory Arbitration**. The parties agree to meet and confer in good faith to resolve any problems or disputes that may arise under this Agreement. Such negotiation shall be a condition precedent to the filing of any arbitration demand by either party. The parties agree that any controversy or claim arising out of or relating to this Agreement ... or breach thereof, whether involving a claim in tort, contract or otherwise, shall be settled by final and binding arbitration in accordance with the provisions of the American Arbitration Association. The parties waive their right to a jury or court trial. The arbitration shall be conducted in San Francisco, California. A single, neutral arbitrator who is licensed to practice law shall conduct

the arbitration. The complaining party serving a written demand for arbitration upon the other party initiates these arbitration proceedings. The written demand shall contain a detailed statement of the matter and facts supporting the demand and include copies of all related documents. MHN shall provide Provider with a list of three neutral arbitrators from which Provider shall select its choice of arbitrator for the arbitration. Each party shall have the right to take the deposition of one individual and any expert witness designated by another party. At least thirty (30) days before the arbitration, the parties must exchange lists of witnesses, including any experts (one each for MHN and Provider), and copies of all exhibits to be used at the arbitration. Arbitration must be initiated within 6 months after the alleged controversy or claim occurred by submitting a written demand to the other party. The failure to initiate arbitration within that period constitutes an absolute bar to the institution of any proceedings. Judgement upon the award rendered by the arbitrator may be entered in any court having competent jurisdiction. The decision of the arbitrator shall be final and binding. The arbitrator shall have no authority to make material

> errors of law or to award punitive damages or to add to, modify or refuse to enforce any agreements between the parties. The arbitrator shall make findings of fact and conclusions of law and shall have no authority to make any award that could not have been made by a court of law. The prevailing party, or substantially prevailing party's costs of arbitration, are to be borne by the other party, including reasonable attorney's fees.

Id. at 56a-57a.

Additionally, the contract contains an express severability clause. This term is captioned "**Severability**" and, like the various provisions in the arbitration clause, is written in the same typeface and typesize as the rest of the contract. Pet. App. 54a. It provides that if "any provision of this Agreement is rendered invalid or unenforceable ... the remaining provisions of this Agreement shall remain in full force and effect." *Id.*

The District Court Permits Respondents To Ignore Their Arbitration Agreement And File A Putative Class-Action Lawsuit Against Petitioners.

Despite the "**Mandatory Arbitration**" provision, Respondents filed a putative class-action lawsuit in district court against Petitioners, alleging violations of the Fair Labor Standards Act. ER 52-104. Consistent with the Agreement, Petitioners

moved to compel arbitration. ER 417. Respondents opposed. ER 267. Applying California law, the district court concluded that multiple terms in the arbitration agreement were unconscionable. Pet. App. 17a-28a.

Though Respondents did not challenge the agreement's severability clause, the district court ignored the clause and refused to sever the purportedly unconscionable provisions. The district court observed that, under California law, a court may decline a request to sever a contract only when the contract "is permeated by unconscionability." *Id.* at 29a (internal quotation marks omitted). The court, however, went on to hold that when the contract at issue is an arbitration agreement, "[t]he finding of 'multiple unlawful provisions' allows a trial court to conclude that 'the arbitration agreement is permeated by an unlawful purpose'" and to deny severance. *Id.* (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 697 (Cal. 2000)). The court thus invalidated the entire arbitration agreement. *Id.* at 30a.

A Divided Ninth Circuit Panel Affirms.

A divided panel of the Ninth Circuit affirmed. The majority of the panel agreed that multiple provisions of the arbitration agreement were unconscionable. *Id.* at 2a-4a. It also upheld the district court's denial of severance. Like the district court, the panel majority relied on a California case that held: "An arbitration agreement can be considered permeated by unconscionability if it 'contains more than one unlawful provision .... Such multiple defects indicate a systematic effort to impose arbitration ... not simply as an alternative to litigation, but as an inferior forum that

works to the [stronger party's] advantage." *Samaniego v. Empire Today, LLC*, 140 Cal. Rptr. 3d 492, 501 (Cal. Ct. App. 2012) (alteration in original), *cited in* Pet. App. 5a.

Moreover, the panel majority rejected "MHN's preemption arguments as foreclosed by" Ninth Circuit precedent, and held that the severability analysis was not "impermissibly unfavorable to arbitration." Pet. App. 5a-6a (citing *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 926-27 (9th Cir. 2013)).

Judge Gould dissented. He noted that two provisions "are arguably not unconscionable and apparently entered into in good faith." *Id.* at 10a, n.1. In any event, Judge Gould would have held that "[t]he reasoning in *Armendariz* [*v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 697 (Cal. 2000)] that multiple unconscionable provisions will render an arbitration agreement's purpose unlawful has 'a disproportionate impact on arbitration agreements' and should have been preempted." *Id.* at 8a (quoting *Concepcion*, 131 S. Ct. at 1747).

According to Judge Gould, "*Concepcion* and its progeny should create a presumption in favor of severance when an arbitration agreement contains a relatively small number of unconscionable provisions that can be meaningfully severed and after severing the unconscionable provisions, the arbitration agreement can still be enforced." *Id.* Applying the appropriate and arbitration-neutral test, Judge Gould found that severance should have been granted, and Respondents held to their basic promise to arbitrate rather than litigate. Judge Gould even included a

redline mark-up of the arbitration agreement, *id.* at 8a-10a, demonstrating graphically that "if all the unconscionable provisions of the arbitration agreement, as determined by the district court and affirmed by th[e] panel, were severed ... the remainder of the arbitration agreement can still be enforced, and the district court need not assume the role of contract author." *Id.* at 8a (internal quotation marks omitted).

Over Judge Gould's vote to rehear the case en banc, the Ninth Circuit denied further review. *Id.* at 31a.

REASONS FOR GRANTING THE PETITION

California applies one severability rule to contracts in general, favoring contract enforcement and severing invalid terms whenever possible. And the State improperly applies a distinct rule to agreements to arbitrate—a rule favoring the nonenforcement of such agreements. The Ninth Circuit's decision here upholding that rule is contrary to binding precedents from this Court construing the FAA, creates conflicts among the courts of appeals, and plainly warrants this Court's review.

I. California's Arbitration-Only Anti-Severance Rule Is Preempted By The FAA.

A. The FAA preempts state laws that discriminate against arbitration.

The FAA was enacted "in response to widespread judicial hostility to arbitration agreements," and "was

designed to promote arbitration." *Concepcion*, 131 S. Ct. at 1745, 1749. The Act reflects "both a 'liberal federal policy favoring arbitration' and the "fundamental principle that arbitration is a matter of contract.'" *Id.* at 1745 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) and *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)). In accord with the FAA's central mandate, courts must treat arbitration agreements "on an equal footing with other contracts, and enforce them according to their terms." *Id.* (citation omitted).

States must at all times maintain "a healthy regard for the federal policy favoring arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). While state courts may declare arbitration agreements unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, state law rules purporting to apply to all contracts are preempted by the FAA when they "have a disproportionate impact on arbitration agreements." *Concepcion*, 131 S. Ct. at 1747. So, too, when a "generally applicable contract defense," applies, in practice, "only to arbitration" or "derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1746.

Though *Concepcion* provides the most recent word from this Court explaining the FAA's broad preemptive force, it is far from the Court's only such pronouncement. The Court has repeatedly emphasized that the FAA preempts state-law defenses that single out or otherwise burden arbitration agreements more than any other contract. *See, e.g., Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203-

04 (2012); *Rent-A-Center*, 561 U.S. at 67-68; *Preston v. Ferrer*, 552 U.S. 346, 356 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443-44 (2006); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88 & n.3 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 16 & n.11 (1984).

B. For contracts generally, California law takes a very liberal view of severability.

Like the laws of most states, California law, generally, expresses an overwhelming preference for contract enforcement. California law generally prohibits a court from voiding a contract unless the entire purpose of the contract is unlawful. If there are contract provisions that are deemed unlawful or unconscionable, it usually requires the court to sever the offending clauses and enforce the remainder. This rule is codified by statute: "Where a contract has but a single object, and such object is unlawful ... the entire contract is void." Cal. Civil Code § 1598. However, "[w]here a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." Cal. Civil Code § 1599; *see also* Cal. Civil Code § 1670.5 ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of

any unconscionable clause as to avoid any unconscionable result.").

California courts have noted that the preference for severance applies even "when the parties have contracted, in part, for something illegal." *Marathon Entm't, Inc. v. Blasi*, 174 P.3d 741, 750 (Cal. 2008). "Notwithstanding any such illegality," the California rule, "preserves and enforces any lawful portion of a parties' contract that feasibly may be severed." *Id.* at 750-51.

In deciding whether to sever, courts "look to the various purposes of the contract." *Id.* at 754. "If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." *Id.* (citation omitted). Only "[i]f the court is unable to distinguish between the lawful and unlawful parts of the agreement" may the court invalidate the entire contract. *Birbower, Montalbano, Condon & Frank v. Super. Ct.*, 949 P.2d 1, 12 (Cal. 1998). That is, severance is appropriate unless "the central purpose of the contract is tainted with illegality." *Marathon*, 174 P.3d at 754 (citation omitted).

The severability inquiry is "equitable and fact specific," and requires "case-by-case consideration." *Id.* at 755. Moreover, outside of the arbitration context, "California cases take a very liberal view of severability, enforcing valid parts of an apparently indivisible contract where the interests of justice or the policy of the law would be furthered." *In re Marriage of Facter*, 152 Cal. Rptr. 3d 79, 95 (Cal. Ct. App.

2013) (quoting *Adair v. Stockton Unified Sch. Dist.*, 77 Cal. Rptr. 3d 62, 73 (Cal. Ct. App. 2008)).

C. For agreements to arbitrate, California law applies a different rule, disfavoring severance.

In stark contrast, California courts have long applied a different rule, favoring the nonenforcement of agreements to arbitrate. In *Armendariz*, "the California Supreme Court held that more than one unlawful provision in an arbitration agreement weighs against severance." *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 106 (Cal. Ct. App. 2004). As the California Supreme Court explained, where an "arbitration agreement contains more than one unlawful provision," that by itself "indicate[s] a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." *Armendariz*, 6 P.3d at 696-97. A court may therefore determine that an arbitration agreement is "permeated by an unlawful purpose" based on the mere existence of two or more unconscionable provisions, and simply refuse to enforce it. *Id.* at 697.

Armendariz's arbitration-only anti-severance rule was applied here and continues to reign in California courts, notwithstanding this Court's most recent explanation of the preemptive force of the FAA in *Concepcion*. *See, e.g.*, *Carmona v. Lincoln Millennium Car Wash, Inc.*, 171 Cal. Rptr. 3d 42, 55 (Cal. Ct. App. 2014) ("When an arbitration agreement contains multiple unconscionable provisions, '[s]uch multiple defects indicate a systematic effort to impose arbitration

on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage.' Under such circumstances, a trial court does not abuse its discretion in determining the arbitration agreement is permeated by an unlawful purpose." (quoting *Armendariz*, 6 P.3d at 697)). It endures even in cases in which the defendant has argued that *Concepcion* stands for the proposition that the FAA preempts state-law rules that disfavor arbitration. *See Samaniego*, 140 Cal. Rptr. 3d at 501 (applying the *Armendariz* arbitration-only anti-severance rule even where appellant argued that *Concepcion* preempted each "unconscionability-based rationale that supported the trial court's refusal to compel arbitration" (internal quotation marks omitted)).

And it persists even in cases such as this one, where the parties agree to a severability clause expressing their clear intent to have the agreement enforced with any invalid terms excised. *See, e.g.*, *Parada v. Super. Ct.*, 98 Cal. Rptr. 3d 743, 753, 768-70 (Cal. Ct. App. 2009) (applying the *Armendariz* arbitration-only anti-severance rule even despite the existence of a severability clause providing "[i]n the event that any provision of this Agreement shall be determined by a trier of fact of competent jurisdiction to be unenforceable ... the remainder of this Agreement shall remain binding upon the parties as if such provision was not contained herein").

Whereas in arbitration agreements, more than one unconscionable provision automatically "indicate[s] a systematic effort to impose arbitration on [a weaker party] ... as an inferior forum that works to

the [stronger party's] advantage," *Armendariz*, 6 P.3d at 697, and allows a court, without further inquiry, to decline to sever the two unconscionable provisions, no comparable rule exists for "other contracts." Instead, when it comes to contracts in general, "California cases take a very liberal view of severability, enforcing valid parts of an apparently indivisible contract where the interests of justice or the policy of the law would be furthered." *In re Marriage of Facter*, 152 Cal. Rptr. 3d at 95 (citation omitted). Thus, California courts improperly apply a harsher standard—favoring nonenforcement—"only to arbitration" agreements, that they do not apply to "other contracts," *Concepcion*, 131 S. Ct. at 1745-46.

II. The Ninth Circuit's Contrary Holding Conflicts With This Court's Precedents And Decisions Of Other Circuits.

A. The Ninth Circuit's holding conflicts with this Court's FAA precedents.

The California court-created special rule disfavoring agreements to arbitrate cannot stand in light of the FAA. *See id.* at 1745-46. As Judge Gould noted, "[t]he reasoning in *Armendariz* that multiple unconscionable provisions will render an arbitration agreement's purpose unlawful," so as to presumptively justify refusal to sever, "has 'a disproportionate impact on arbitration agreements' and should have been preempted by the [FAA]." Pet. App. 8a (quoting *Concepcion*, 131 S. Ct. at 1747). In fact, the rule applies only to agreements to arbitration, not to all contracts.

The Ninth Circuit majority's rejection of Petitioners' "preemption arguments" as foreclosed by Ninth Circuit precedent, and its insistence that its analysis was not "impermissibly unfavorable to arbitration," Pet. App. 5a-6a, thus conflicts with this Court's precedents. This Court has unambiguously held that the FAA preempts state law rules purporting to apply to all contracts when they "have a disproportionate impact on arbitration agreements," or when a "generally applicable contract defense" applies, in practice, "only to arbitration," or "derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746-47; *see supra*, § I.A. Here, California's arbitration-only anti-severance rule both applies only to agreements to arbitrate, and "derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *Id.* As earlier noted (at § I.B.), there is simply no comparable rule for contracts generally that more than one unconscionable or illegal provision automatically indicates an intent to steamroll the weaker party and thus allows a court to refuse severance.

Judge Gould was thus correct in concluding that "the district court's decision not to sever the unconscionable provisions of the arbitration agreement relying on *Armendariz* is ... based on an erroneous interpretation and an inaccurate view of *Concepcion* and the FAA." Pet. App. 11a. The *Armendariz* arbitration-only anti-severance rule is impossible to reconcile both with the text of the FAA and with this Court's precedents construing the FAA.

B. The Ninth Circuit's holding conflicts with decisions of other courts of appeals.

The Ninth Circuit's ruling not only conflicts with the FAA's clear mandate and this Court's precedents, it also puts the Ninth Circuit squarely in conflict with at least four other courts of appeals.

First, the Ninth Circuit's decision directly conflicts with the Seventh Circuit as to whether California may enforce rules that "treat[] arbitration differently." *Oblix, Inc. v. Winiecki*, 374 F.3d 488, 491-92 (7th Cir. 2004). In *Oblix*, the employee argued that the arbitration clause in her employment agreement was unconscionable under *Armendariz*, because it did not meet the "special requirements" for arbitration clauses established in that case. *Id.* at 492. The Seventh Circuit held that even if *Armendariz* did create "special hurdles for arbitration agreements," it was "irrelevant" whether the arbitration clause at issue met them, because the Supreme Court of California had no power to "apply to arbitration ... any novel rule." *Id.* On the contrary, "if a state treats arbitration differently, and imposes on form arbitration clauses more or different requirements from those imposed on other [form] clauses, then its approach is preempted by" the FAA. *Id.* Thus, according to the Seventh Circuit, any portion of *Armendariz* that creates "special hurdles for arbitration agreements," is squarely preempted by the FAA. *Id.*

Armendariz's arbitration-only anti-severance rule is a "special hurdle[] for arbitration agreements," *id.*

Thus, had this case been litigated in the Seventh Circuit, the rule would have been preempted by the FAA. This Court should grant review to address this direct conflict and determine whether the "Supreme Court of California ... [can] treat arbitration less favorably than other promises in form contracts," *Oblix, Inc.*, 374 F.3d at 492, as the Ninth Circuit has held, or whether such differential treatment is preempted by the FAA, as the Seventh Circuit has held.

Second, the application of California's arbitration-only rule even despite the express severability clause in Petitioners' contract conflicts with opinions of at least three other circuits.

As earlier noted (at 7), the parties in this case expressly agreed that any invalid terms of the contract would be severed. Captioned "Severability," the provision explicitly provides that if "any provision of this Agreement is rendered invalid or unenforceable ... the remaining provisions of this Agreement shall remain in full force and effect." Pet. App. 54a. Respondents have never challenged this clause. Yet the Ninth Circuit majority failed to honor it or even give it any weight. California courts do the same, applying the arbitration-only anti-severance rule even to contracts that contain express severability clauses. *See, e.g.*, *Parada*, 98 Cal. Rptr. 3d at 753, 768-70. This conflicts with the holdings of at least three other courts of appeals.

The FAA reflects "a liberal federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. Thus, "in applying general state-law principles" of

contract enforcement to the enforcement of an arbitration agreement under the FAA, "due regard must be given to the federal policy favoring arbitration." *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475-76 (1989). The FAA also recognizes that agreements to arbitrate are a matter of contract, and requires courts to enforce them "according to their terms." *Concepcion*, 131 S. Ct. at 1745. In cases in which the parties have expressly agreed to sever any invalid or unenforceable clause, severing not only respects the agreement of the parties but also recognizes the strong federal policy favoring enforcing arbitration agreements "according to their terms."

The Sixth Circuit has thus held that, "when the arbitration agreement at issue includes a severability provision, courts should not lightly conclude that a particular provision of an arbitration agreement taints the entire agreement." *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 675 (6th Cir. 2003). To the contrary: "[W]hen [an] agreement includes [a] severability provision, [the] intent of the parties and [federal] policy in favor of arbitration dictate" that the remainder of the agreement be enforced. *Id.* This is especially so given the FAA's mandate to "resolve any doubts as to arbitrability in favor of arbitration." *Id.*

The Eighth Circuit agrees, noting that "'[t]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered,' a concern which 'requires that we rigorously enforce agreements to arbitrate.'" *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 682 (8th Cir. 2001) (quoting *Mitsubishi Motors Corp. v. Soler*

Chrysler–Plymouth, Inc., 473 U.S. 614, 625-26 (1985)). Therefore, not only do the parties' intentions, as expressed in a severability clause, control, but "those intentions are generously construed as to issues of arbitrability." *Id.* (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 626). Courts that ignore severability clauses and "hold entire arbitration agreements unenforceable ... represent the antithesis of the 'liberal federal policy favoring arbitration agreements.'" *Id.* (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24).

The D.C. Circuit reasoned similarly in *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005) (Roberts, J.). The court noted that enforcing a severability clause not only "honor[s] the intent of the parties reflected in the ... agreement," but also is "faithful to the federal policy which 'requires that we rigorously enforce agreements to arbitrate.'" *Id.* at 85-86 (quoting *Mitsubishi Motors*, 473 U.S. at 626)).

Unlike the Ninth Circuit and the California courts, these three courts of appeals recognize that enforcing a contractual severability clause not only respects the parties' contractual agreement, but also adheres to the liberal federal policy favoring arbitration. In practical terms, that means severability clauses are generally enforced if a party moves to compel arbitration in Washington, DC, Michigan, Ohio, Missouri or Minnesota. But that same severability clause will generally be ignored if the same party moves to compel arbitration, under the same agreement, in California. This Court should grant review to resolve this conflict.

III. This Is An Issue Of Exceptional Importance That Warrants This Court's Immediate Intervention.

Review of the decision below is critical to stem the California state courts' ongoing effort to "'chip[] away at' [this Court's] precedents broadly construing the scope of the FAA ..., despite [this Court's] admonition against doing so." *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 999 (Cal. 2003) (Brown, J., concurring and dissenting) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001)).

The California arbitration-specific severance rule illustrates a troubling pattern. Time and again, California courts have imposed conditions on the enforcement of arbitration agreements that reflect ongoing and repeated hostility towards arbitration. *See, e.g.*, *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67 (Cal. 1999) (categorically prohibiting arbitration of claims for injunctive relief under California's Consumers Legal Remedies Act); *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157 (Cal. 2003) (extending *Broughton* to prohibit arbitration of claims for injunctive relief under California's unfair competition and misleading advertising laws); *Little*, 63 P.3d at 990 (holding that a common law claim for wrongful termination in violation of public policy is only arbitrable where the arbitration guarantees "availability of damages remedies equal to those available ... in court, including punitive damages; discovery sufficient to adequately arbitrate [the] claims; a written arbitration decision and judicial review sufficient to ensure that arbitrators have complied with the law ...; and allocation of arbitration costs so that they will

not unduly burden the employee"); *Ferrer v. Preston*, 51 Cal. Rptr. 3d 628, 634 (Cal. Ct. App. 2007) (refusing to enforce arbitration agreement for "controversies colorably arising under [California's] Talent Agencies Act"), *rev'd*, 552 U.S. 346 (2008); *Sonic-Calabasas A, Inc. v. Moreno*, 247 P.3d 130 (Cal. 2011) (invalidating, as contrary to public policy, arbitration agreement that waived certain administrative hearings before the California Labor Commissioner), *vacated*, 132 S. Ct. 496 (2011) (mem.); *see also* Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 54, 66 (2006).

This Court's intervention is again required to address California's hostility to arbitration agreements.[2] Even after *Concepcion*, California law

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[2] *See DIRECTV, Inc. v. Imburgia*, No. 14-462 (granting cert to determine whether the California Court of Appeal erred by holding that a reference to state law in an arbitration agreement governed by the FAA requires the application of state law preempted by the FAA); *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011) (vacating California Supreme Court decision for further consideration in light of *Concepcion*); *Concepcion*, 131 S. Ct. at 1751 (reversing Ninth Circuit); *Preston*, 552 U.S. 346 (reversing California Court of Appeal and holding that FAA preempts California law lodging primary jurisdiction in administrative forum); *Perry*, 482 U.S. 483 (reversing California Court of Appeal and holding that FAA preempts provision of California Labor Law stating that wage collection actions could be maintained even despite an agreement to arbitrate); *Southland Corp.*, 465 U.S. 1 (reversing California Supreme Court and holding that FAA preempts provision of California Franchise Investment Law requiring judicial consideration of claims).

continues to display the type of hostility toward arbitration agreements that the FAA was designed to end. *See, e.g., Brown v. Super. Ct.*, 157 Cal. Rptr. 3d 779, 781 (Cal. Ct. App. 2013) (holding that claim under Private Attorneys General Act of 2004 is not subject to arbitration because it "is necessarily a representative action intended to advance a predominantly public purpose"), *vacated for reconsideration in light of Iskanian v. CLS Transp. of L.A.*, 327 P.3d 129 (2014), *by* 331 P.3d 1274 (2014); *James v. Conceptus, Inc.*, 851 F. Supp. 2d 1020, 1036-37 (S.D. Tex. 2012) (concluding that, even after *Concepcion*, California courts continue to find arbitration forum-selection clauses unenforceable under a far more stringent test than that applicable to "forum-selection clauses outside of the arbitration context").

This Court's intervention on the severance issue is particularly important. Severance arises in literally every arbitration case in which one or more provisions is found to be unconscionable. And the sheer breadth of arbitration in today's business world makes that universe even larger still. As this Court is well aware, arbitration clauses appear in a dizzying array of contracts involving a myriad of goods and services.[3]

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[3] *See, e.g., Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (home improvement loan agreement); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (commercial construction debt restructuring agreement); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (employment agreement); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (mobile-home financing and insurance agreement); *Wright v. Universal Mar. Serv. Corp.*, 525

Focusing specifically on employment agreements, the California arbitration-only severance rule, if left unreviewed, will continue to undermine the benefits of arbitration for a large number of employment disputes like the one at issue in this case. California, the country's most populous State, accounted for more than 11 percent of U.S. private-sector employees in 2012. *See* U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/06000.html (last visited June 10, 2015) (showing that California had 13,401,863 private nonfarm employees out of 118,266,253 nationwide). And arbitration agreements in employment are widespread. *See, e.g.*, Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 48 Dispute Resolution J. 44 (Nov. 2003-Jan. 2004) (noting the "massive," "well documented" increase in the use of employment arbitration agreements).

Like arbitration generally, employment arbitration benefits both employees and employers because it provides faster and more cost-effective dispute resolution. *See, e.g.*, Mark Fellows, *The Same Result As*

U.S. 70 (1998) (longshoremen's collective bargaining agreement); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (securities brokerage account agreement); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995) (termite control contract); *Gilmer*, 500 U.S. 20 (registered securities representative registration/employment agreement); *Volt Info. Sci.*, 489 U.S. 468 (construction contract); *Mitsubishi Motors Corp.*, 473 U.S. 614 (automobile manufacturer distribution and sales agreement); *Gen. Atomic Co. v. Felter*, 436 U.S. 493 (1978) (uranium supply agreement); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (paint manufacturing and sales consulting agreement).

In Court, More Efficiently: Comparing Arbitration And Court Litigation Outcomes, Metro. Corp. Couns., July 2006, at 32, *available at* http://www.metrocorpcounsel.com/articles/6988/same-result-court-more-efficiently-comparing-arbitration-and-court-litigation-outcomes. Empirical studies have shown that arbitration of employment disputes yields results comparable to litigation, but in less time and at lower cost. *See, e.g.*, Eisenberg & Hill at 45 (finding no statistically significant differences between arbitration and trial outcomes with regard to employee win rates or median or mean award levels for "higher paid employees" bringing "non-civil-rights-employment claims"); Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final And Binding Arbitration Has No Fairy Tale Ending*, 13 Harv. Negot. L. Rev. 167, 184 (2008) (citing study showing that "[e]mployees won more often in arbitration than similar plaintiffs in court"); Lewis Maltby, *Employment Arbitration: Is It Really Second Class Justice?* 6 Disp. Resol. Mag. 23, 24 (1999) (article by the director of the ACLU's National Task Force on Civil Liberties in the Workplace finding that "far more employees win in arbitration than in court, and, overall, employees who take their disputes to arbitration collect more than those who go to court").

The California arbitration-specific severance rule that the Ninth Circuit majority held not preempted by the FAA increases the likelihood that these basic benefits will be thrown away in any given case. After all, the rule allows courts to invalidate an entire arbitration agreement simply upon a showing that it contains more than one unconscionable provision, because "multiple defects indicate a systematic effort

to impose arbitration ... not simply as an alternative to litigation, but as an inferior forum that works to the [stronger party's] advantage." *Armendariz*, 6 P.3d at 697. No similar rule applies to "any contract." This Court should grant certiorari and hold the California arbitration-only severability rule preempted by the FAA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 10, 2015

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[FILED DEC 17 2014 MOLLY C. DWYER, CLERK U.S. COURT OF APPEALS]

THOMAS ZABOROWSKI; VANESSA BALDINI; KIM DALE; NANCY PADDOCK; MARIA HOWARD; TIM PLATT, on behalf of themselves and all others similarly situated,

Plantiffs - Appellees

v.

MHN GOVERNMENT SERVICES, INC.; MANAGED HEALTH NETWORK, INC.,

Defendants- Appellants

No. 13-15671

D.C. No. 3:12-cv-05109-SI

MEMORANDUM*

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*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appeal from the United States Court for the Northern District of California Susan Illston, Senior District Judge, Presiding

Argued and Submitted November 18, 2014 San Francisco, California

Before: GOULD and WATFORD, Circuit Judges, and MARTINEZ, District Judge.**

MHN Government Services, Inc. (MHN) appeals from the district court's order denying its motion to compel arbitration. We affirm.

1. The district court correctly held that the arbitration provision is procedurally unconscionable. *See Chavarria v. Ralph's Grocery Co.*, 733 F.3d 916, 922–23 (9th Cir. 2013). The district court found that MHN was in a superior bargaining position, the arbitration provision was a condition of employment, and plaintiffs were not given a meaningful opportunity to negotiate. These findings are not clearly erroneous, and they support the conclusion that the contract is oppressive. *See Ellis v. McKinnon Broad. Co.*, 23 Cal. Rptr. 2d 80, 83 (Ct. App. 1993) (defining oppression as the absence of real negotiation and meaningful choice resulting from inequality of bargaining power). Contrary to MHN's contention, the contract's modification provision did not invite negotiation, and California law does not require plaintiffs to have attempted to negotiate in order to

** The Honorable Ricardo S. Martinez, District Judge for U.S. District Court for the Western District of Washington, sitting by designation.

show oppression. *See, e.g., Circuit City Stores, Inc. v. Mantor,* 335 F.3d 1101, 1106–07 (9th Cir. 2003); *A&M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 125 (Ct. App. 1982).

2. The district court also correctly held that multiple aspects of the arbitration provision are substantively unconscionable.

First, the arbitrator-selection clause is substantively unconscionable. *See Chavarria*, 733 F.3d at 923–26. The clause gives MHN the power to control arbitrator candidates so long as those arbitrators are licensed to practice law and are purportedly "neutral." Granting MHN near-unfettered discretion to select its three preferred arbitrators is "unjustifiably one-sided," *Chavarria*, 733 F.3d at 923, and unreasonably reallocates risks to the weaker bargaining party. *Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492, 497 (Ct. App. 2012).

Second, the contract's sixth-month limitations period is substantively unconscionable. California law permits contractually shortened limitations periods so long as they "provide a party sufficient time to effectively pursue a judicial remedy." *Ellis v. U.S. Sec. Assocs.*, 169 Cal. Rptr. 3d 752, 757 (Ct. App. 2014) (internal quotation marks omitted). The district court correctly noted that violations of labor laws are not discovered overnight: It takes time to recognize the violation, investigate it, and file a claim. Given the nature of plaintiffs' claims, the sixth-month limitations period works as a "practical abrogation of

the right of action." *Ellis*, 169 Cal. Rptr. 3d at 757 (internal quotation marks omitted).

Third, the costs-and-fee-shifting clause is substantively unconscionable. The clause awards fees and costs to the "prevailing party, or substantially prevailing party[]," which means that even if plaintiffs prevail on some of their claims but not all, they may still be required to pay MHN's attorney's fees and costs. This provision is contrary to the applicable statutory cost-shifting regimes provided by California and federal law, which entitle only the prevailing plaintiff to an award of costs and fees. *See* 29 U.S.C. § 216(b); Cal. Lab. Code § 1194(a). "There is no justification to ignore a [statutory] cost-shifting provision, except to impose upon the employee a potentially prohibitive obstacle to having her claim heard." *Chavarria*, 733 F.3d at 925. The costs-and-fee-shifting clause results in an "unreasonable" and "unexpected" allocation of risks. *Samaniego*, 140 Cal. Rptr. 3d at 497. Its effect is to chill employees from seeking vindication of their statutory rights by pursuing claims in arbitration.

Finally, we agree with the district court that, to at least a limited degree, the filing fees and punitive damages waiver are substantively unconscionable. The $2600 filing fee imposed by the commercial arbitration rules hampers one party—the employee—much more than the other. Likewise, the punitive damages waiver "improperly proscribes available statutory remedies" afforded to plaintiffs bringing employment claims. *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1179 (9th Cir. 2003).

3. The district court did not abuse its discretion by declining to sever the unconscionable portions of the arbitration provision. *See* Cal. Civ. Code § 1670.5(a); *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1005–06 (9th Cir. 2010) (holding that the district court did not abuse its discretion in refusing to enforce an unconscionable arbitration clause in its entirety). Although the Federal Arbitration Act expresses a strong preference for the enforcement of arbitration agreements, the Act does not license a party with superior bargaining power "to stack the deck unconscionably in [its] favor" when drafting the terms of an arbitration agreement. *Ingle*, 328 F.3d at 1180. Under generally applicable severance principles, California courts refuse to sever when multiple provisions of the contract permeate the entire agreement with unconscionability. *See Samaniego*, 140 Cal. Rptr. 3d at 1149. The district court found that to be the case here, because striking the five unconscionable clauses would require it to "assume the role of contract author rather than interpreter." *Ingle*, 328 F.3d at 1180. While we may have reached a different conclusion on that score had we been conducting the analysis in the first instance, we cannot say that the district court's determination is "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc).

4. We reject MHN's preemption arguments as foreclosed by recent case law. *See Chavarria*, 733 F.3d at 926–27. *Chavarria* applied the same general principles of California unconscionability law we have applied here. Application of those principles does not

result in an analysis that is impermissibly unfavorable to arbitration.

AFFIRMED.

APPENDIX B

[FILED DEC 17 2014 MOLLY C. DWYER, CLERK U.S. COURT OF APPEALS]

Zaborowski v. MHN Government Services, Inc., No. 13-15671

GOULD, Circuit Judge, concurring in part, and dissenting in part:

I concur in paragraphs 1 and 2 of the memorandum disposition but dissent from the majority's conclusion in paragraphs 3 and 4 of the memorandum disposition that the district court did not abuse its discretion in not severing the unconscionable provisions of the arbitration agreement. I would reverse the district court on this issue, requiring severance and leaving the arbitration agreement in place.

A district court abuses its discretion when it erroneously interprets a law, *United States v. Beltran-Gutierrez*, 19 F.3d 1287, 1289 (9th Cir. 1994), or when it rests its decision on an inaccurate view of the law, *Richard S. v. Dep't of Dev. Servs.*, 317 F.3d 1080, 1085–86 (9th Cir. 2003). In determining whether to sever the unconscionable provisions of the arbitration agreement, the district court relied on a California state court decision holding that "multiple unlawful provisions" allow a trial court to conclude that "the arbitration agreement is permeated by an unlawful purpose." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 697 (Cal. 2000).

But *Armendariz* was decided more than a decade before the Supreme Court's decision *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011). The United States Supreme Court has vindicated a liberal federal policy favoring arbitration. The reasoning in *Armendariz* that multiple unconscionable provisions will render an arbitration agreement's purpose unlawful has "a disproportionate impact on arbitration agreements" and should have been preempted by the Federal Arbitration Act ("FAA"). *Concepcion,* 131 S. Ct. at 1747.

In my view, *Concepcion* and its progeny should create a presumption in favor of severance when an arbitration agreement contains a relatively small number of unconscionable provisions that can be meaningfully severed and after severing the unconscionable provisions, the arbitration agreement can still be enforced. *Id.*; *see also Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983) (holding that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"). Here, if all the unconscionable provisions of the arbitration agreement, as determined by the district court and affirmed by this panel, were severed (as shown by the strikeouts in the paragraph below), the remainder of the arbitration agreement can still be enforced, and the district court need not "assume the role of contract author," *Ingle*, 328 F.3d at 1180:

> ***Mandatory Arbitration.*** The parties agree to meet and confer in good faith to resolve any problems or disputes that may arise under this Agreement. Such

negotiation shall be a condition precedent to the filing of any arbitration demand by either party. The parties agree that any controversy or claim arising out of or relating to this Agreement (and any previous agreement between the parties if this Agreement supersedes such prior agreement) or breach thereof, whether involving a claim in tort, contract or otherwise, shall be settled by final and binding arbitration in accordance with the provisions of the American Arbitration Association. The parties waive their right to a jury or court trial. The arbitration shall be conducted in San Francisco, California. A single, neutral arbitrator who is licensed to practice law shall conduct the arbitration. The complaining party serving a written demand for arbitration upon the other party initiates these arbitration proceedings. The written demand shall contain a detailed statement of the matter and facts supporting the demand and include copies of all related documents. ~~[MHN shall provide Provider with a list of three neutral arbitrators from which Provider shall select its choice of arbitrator for the arbitration.]~~ Each party shall have the right to take the deposition of one individual and any expert witness designated by another party. At least

thirty (30) days before the arbitration, the parties must exchange lists of witnesses, including any experts (one each for MHN and Provider), and copies of all exhibits to be used at the arbitration. [~~Arbitration must be initiated within 6 months after the alleged controversy or claim occurred by submitting a written demand to the other party. The failure to initiate arbitration within that period constitutes an absolute bar to the institution of any proceedings.~~] Judgment upon the award rendered by the arbitrator may be entered in any court having competent jurisdiction. The decision of the arbitrator shall be final and binding. The arbitrator shall have no authority to make material errors of law [~~or to award punitive damages~~] or to add to, modify or refuse to enforce any agreements between the parties. The arbitrator shall make findings of fact and conclusions of law and shall have no authority to make any award that could not have been made by a court of law. [~~The prevailing party, or substantially prevailing party's costs of arbitration, are to be borne by the other party, including reasonable attorney's fees.~~][1]

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[1] Although for purpose of illustrating severance, all unconscionable provisions of the arbitration agreement, as found by the district court and affirmed by this panel, were severed,

The district court's decision not to sever the unconscionable provisions of the arbitration agreement relying on *Armendariz* is in my view based on an erroneous interpretation and an inaccurate view of *Concepcion* and the FAA. *Beltran-Gutierrez*, 19 F.3d at 1289; *Richard S.*, 317 F.3d at 1085–86. Accordingly, in my view the district court's decision not to sever the unconscionable provisions of the arbitration agreement should have been reversed, preserving to the parties their basic agreement to arbitrate disputes, and furthering the policies of the FAA as implemented in *Concepcion*. I respectfully dissent in part as to the disposition's affirmance of the district court on the severance issue.

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some of these provisions are arguably not unconscionable and apparently entered into in good faith, such as the six-month limitations period and the punitive damages waiver provisions. The provisions to be severed constitute a relatively small portion of the arbitration agreement and should not be used to eliminate the parties' ability to arbitrate their disputes. I recognize that one can imagine an arbitration agreement where the number and content of unconscionable provisions are so pervasive that they rebut the presumption in favor of severance. If that were so, it would then be within a district court's discretion not to sever the unconscionable provisions and not to enforce the arbitration agreement. But I do not view the challenged provisions here as being sufficient to rebut a presumption in favor of severance that I urge should arise under *Concepcion* on the facts here.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

THOMAS ZABOROWSKI, et. al, on behalf of themselves and a putative class,

Plaintiffs,

v.

MHN GOVERNMENT SERVICES, INC. and MANAGED HEALTH NETWORK, INC.,

Defendants,

No. C 12-05109 SI

ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION

On March 15, 2013, the Court heard argument on defendants' motion to compel arbitration. Having carefully considered the arguments of counsel and the papers submitted, the motion is DENIED, for the reasons set forth below.

BACKGROUND

Defendants hired plaintiffs to provide counseling to military service members and their families. Plaintiffs, as Military Family Life Consultants ("MFLCs" or "MFL Consultants"), provide financial counseling, child services, and

victim advocacy counseling at U.S. military installations across the country and internationally. Plaintiffs have professional licenses and are rotated on short-term assignments to different locations. Plaintiffs filed this suit alleging that MHN Government Services, Inc. and Managed Health Network, Inc. (collectively "MHN") misclassified them as independent contractors, and that they should be classified as employees and entitled to overtime compensation. They assert claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), and similar state labor laws.

The standard counseling services contract between MHN and an MFL Consultant is called a Provider Services Task Order Agreement ("Agreement"). The Agreement contains an express mandatory arbitration clause. The arbitration clause states in pertinent part:

> The parties agree that any controversy or claim arising out of or relating to this Agreement . . . or the breach thereof, whether involving a claim in tort, contract or otherwise, shall be settled by final and binding arbitration in accordance with the provisions of the American Arbitration Association. The parties waive their right to a jury or court trial.

First Amended Complaint ("FAC"), Ex. A ¶ 20. Some of the procedural rules set forth in the Agreement include: the provisions of the American Arbitration Association ("AAA") govern; the arbitration shall be conducted in San Francisco, California; the arbitrator

must be licensed to practiced law; MHN shall choose three arbitrators, and the MHN Consultant shall choose one amongst them; each party may depose one individual and any opposing expert witness; arbitration must be initiated within six months of the claim's occurrence; the arbitrator may not modify or refuse to enforce any agreements; the parties may not be awarded punitive damages; and the prevailing party or substantially prevailing party's costs are borne by the other party. *Id.*

Plaintiffs argue that the arbitration clause is both procedurally and substantively unconscionable, and therefore they should not be compelled to arbitrate their claims.

LEGAL STANDARD

Section 4 of the Federal Arbitration Act ("FAA") permits "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States District Court . . for an order directing that . . . arbitration proceed in the manner provided for in [the arbitration] agreement." 9 U.S.C. § 4. Upon a showing that a party has failed to comply with a valid arbitration agreement, the district court must issue an order compelling arbitration. *Id.*

The FAA espouses a general policy favoring arbitration agreements. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Federal courts are required to rigorously enforce an agreement to arbitrate. *See Hall*

Street Assoc., L.L.C. v. Mattel, Inc., 552 U.S. 576, 582 (2008). Courts are also directed to resolve any "ambiguities as to the scope of the arbitration clause itself . . . in favor of arbitration." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989).

However, the strong presumption in favor of arbitration "does not confer a right to compel arbitration of any dispute at any time." *Volt*, 489 U.S. at 474. The FAA provides that arbitration agreements are unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Arbitration agreements may be invalidated by "'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (quoting *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). This is because "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). Accordingly, the Court reviews arbitration agreements in light of the "liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract," and therefore the Court "must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *Concepcion*, 131 S. Ct. at 1745-46 (quotations and citations omitted).

DISCUSSION

I. Unconscionable Arbitration Agreement

In *Concepcion*, the lower courts had relied on a California Supreme Court case, *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), which created a rule that prohibited as unconscionable class action waivers in arbitration agreements. The *Concepcion* Court explained that when a rule "prohibits outright the arbitration of a particular type of claim," then it is preempted by the FAA. 131 S. Ct. at 1747 However, *Concepcion* explicitly reaffirmed California's general contract defense of unconscionability as applied to arbitration agreements. Only "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" are preempted by the FAA, and therefore invalid. *Concepcion*, 131 S. Ct. at 1746.

Under California law,[1] a contract is not enforceable if it is found to be unconscionable. *See, e.g., Armendariz v. Found. Health Psychcare Svcs., Inc.*, 24 Cal. 4th 83, 91 (2000). In order for a court to find an arbitration agreement unconscionable as a whole, the court must find that the agreement is both procedurally and substantively unconscionable. *Kilgore v. KeyBank, Nat. Ass'n*, 673 F.3d 947, 963 (9th Cir. 2012) (citing *Armendariz*, 24 Cal. 4th at 99). "Courts use a 'sliding scale' in analyzing these two elements: '[T]he more substantively oppressive the

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[1] The parties do not dispute that California law governs this case.

contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'" *Id.* (quoting *Armendariz*, 24 Cal. 4th at 99).

A. Procedural Unconscionability

Under California law, a contract is procedurally unconscionable if there is "oppression" or "surprise." *Armendariz*, 24 Cal. 4th at 114. Additionally, "California law treats contracts of adhesion . . . as procedurally unconscionable to at least some degree." *Lau v. Mercedes-Benz USA, LLC*, CV 11-1940 MEJ, 2012 WL 370557, at *8 (N.D. Cal. Jan. 31, 2012) (quoting *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1004 (9th Cir. 2010)). "Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice, while surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them." *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280 (9th Cir. 2006) (quoting *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846, 853 (2001)) (quotations omitted).

Here, the Agreement is a contract of adhesion because it is "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Armendariz*, 24 Cal. 4th at 113; *see* FAC ¶

83; Baldini Decl. ¶¶ 3-4; Zaborowski Decl. ¶ 25.[2] The Court in *Concepcion* explicitly recognized that California is "free to take steps addressing the concerns that attend contracts of adhesion." 131 S. Ct. at 1750 n.6. Adhesion alone, however, is insufficient to find a contract unconscionable.

Additionally, the Agreement contains elements of oppression. MHN is in a superior bargaining position to the individual MFL Consultants. It is a sophisticated business entity whose lawyers drafted the agreement, while the employees generally do not retain attorneys to review their contracts. Although the disparity in bargaining power is diminished because MFL Consultants are well-educated

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[2] On March 28, 2013, about two weeks after the hearing on this motion, MHN filed a motion for administrative relief, seeking leave to file a supplemental declaration on the arbitration issue. The declaration, executed by a vice-president of MHN, attaches MHN's "Policy and Procedure" concerning "non-standard Provider contracts." The declarant states that "on at least one occasion" an MFL Consultant requested and received a change in contract language concerning indemnification. No explanation was offered why this information was not provided in a timely manner, prior to the hearing, and the administrative motion to file the supplemental declaration is DENIED on that account. Had it been timely provided, the declaration's assertions could have been explored at argument; issues such as how many MFL Consultants have been employed by MHN over the years, how many changes have been requested, how many changes have been rejected, etc. could have been discussed. In any event, it is not clear that this "Policy and Procedure," with its many levels and layers of required approval, was made known to plaintiff MFL Consultants or that it provided the opportunity for "real negotiation" and "meaningful choice." *Nagrampa*, 469 F.3d at 1280; *Flores*, 93 Cal. App. 4th at 853.

professionals, it is not fully dispelled. Moreover, signing the Agreement was a condition of employment with MHN, and MFL Consultants were given no general opportunity to renegotiate the terms. *Compare Kilgore*, 673 F.3d at 964 (finding no procedural unconscionability because there was a 60-day opt-out provision), *with Lau*, 2012 WL 370557, at *8 (finding a contract oppressive when it was presented on a take-it-or-leave it basis and there was no opportunity to negotiate any of the pre-printed terms).

Furthermore, surprise is present in the Agreement. The arbitration clause appears in paragraph twenty of twenty-three paragraphs. It is not set apart from the rest of the agreement in any way, such as highlighting or outlining; the signature line is on the following page, and it does not require a separate signature. *See Lau*, 2012 WL 370557, at *8 (finding the element of surprise when the arbitration clause was not set apart from the rest of the contract and was not on the same page where a signature was required).

Accordingly, the Court finds that the arbitration clause was procedurally unconscionable because the agreement was a contract of adhesion, was oppressive, and created an unfair surprise.

B. Substantive Unconscionability

An arbitration provision is substantively unconscionable if it is "overly harsh" or generates "'one-sided' results." *Armendariz*, 24 Cal. 4th at 114; *see also Ingle v. Circuit City Stores, Inc.*, 328 F.3d

1165, 1172 (9th Cir.2003) (defining. substantive unconscionability as whether the terms of an agreement are so one-sided as to shock the conscience). This can be shown if the disputed provisions of the agreement fall outside the reasonable expectations of the party of inferior bargaining power in an adhesion contract. *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 820 (1981).

Plaintiffs argue that eight terms in the Agreement are substantively unconscionable. The Court need not find all eight terms overly harsh or one-sided to find that there is substantive unconscionability in the Agreement.

1. Six-month Statute of Limitations

First, the Agreement provides that "[a]rbitration must be initiated within 6 months after the alleged controversy or claim occurred." FAC, Ex. A ¶ 20. California courts generally uphold a contractually shortened statute of limitations, as long as the shortened period is "reasonable." *Moreno v. Sanchez*, 106 Cal. App. 4th 1415, 1430 (2003). However, California courts understand "reasonable" as a sufficient time period to discover and pursue remedies; contractually shortening a statute of limitations is generally not accepted in cases other than a "breach of a contract or for the accrual of a right [that] is immediate and obvious." *Id.* (finding that a one-year statute of limitations from accrual instead of discovery in a home inspection contract is unconscionable). The issue of delayed discovery is especially relevant in an employment context, where the cause of action may not be discovered for long

periods of time. The difficulty of discovery is true whether the MFL Consultants are determined to be employees or contractors. California courts have generally disapproved of contractually limiting the statute of limitations in the employment context, especially if doing so would foreclose statutory remedies to which the plaintiff may be otherwise entitled. *See, e.g., Ingle*, 328 F.3d at 1175 (finding a one-year statute of limitations unconscionable because it would deprive plaintiffs of the benefit of the continuing violation doctrine available in FEHA suits). The six-month limitation here is not sufficient for plaintiffs to discover the alleged FLSA violations, which rely on the treatment of MFL Consultants over time.

Therefore, the Court finds that this provision is unconscionable under California law.

2. MHN's Choice of the Pool of Arbitrators

Second, the arbitration clause allows MHN to unilaterally choose the pool of arbitrators. The arbitration agreement provides that "MHN shall provide Provider [MFLC] with a list of three neutral arbitrators from which Provider shall select its choice of arbitrator for the arbitration." FAC, Ex. A ¶ 20. This allows for creation of a very one-sided arbitration process, since MHN has the opportunity to choose the three most sympathetic arbitrators it can find, and the MFL Consultant will not be presented with a meaningful choice. MHN argues that this clause should be construed to mean that the MFL Consultant would choose an arbitrator from the

AAA's list. However, that is not what the terms of the clause state. Under the plain meaning of the Agreement, MHN can select any three arbitrators it wishes, as long as the arbitrators are licensed to practice law. This term is substantively unconscionable. *See Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1003 (9th Cir. 2010) (finding an arbitrator selection process substantively unconscionable where the employer hand-selected a pool of five arbitrators that it had specially trained, from which the plaintiff could choose its arbitrator).

3. Limited Discovery

Third, plaintiffs argue that the limited discovery provided under the Agreement is unconscionable. The Agreement allows each party to depose one individual and the opposing expert witness. The parties must exchange witness lists 30 days before arbitration, and each is limited to a single expert witness. Plaintiffs argue that this in [sic] inadequate, because the issues are complex, and because they frequently change locations, so they may need many witnesses. FAC, Ex. A ¶ 20.

As the Supreme Court has recognized, arbitration typically involves limited discovery rights. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). Limited discovery, in itself, cannot be the basis for finding an arbitration agreement unconscionable, because such a rule would impermissibly rely on the fact that an agreement to arbitrate is at issue. Rather, for the discovery provisions to be unconscionable, they must be so limited as to "prove insufficient to allow [plaintiffs] a

fair opportunity to present their claims." *Id.*; *see also Armendariz*, 24 Cal. 4th at 106 (holding that plaintiffs "are entitled to discovery sufficient to adequately arbitrate their statutory claims, including access to essential documents and witnesses"). Moreover, the discovery provisions cannot be one-sided. *See Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 786 (9th Cir. 2002) (finding the discovery provision one-sided because it only placed limits on the number of corporate representatives that could be deposed, but no comparable limits for the plaintiff).

The Court finds that plaintiffs have not met their burden in showing that the limited discovery is so one-sided or inadequate that it is unconscionable.

4. Filing Fees

Next, plaintiffs argue that the term requiring AAA filing fees is unconscionable. MHN argues that the AAA commercial arbitration rules govern. Under these rules, the required forum fees increase with the amount in controversy. For claims up to $10,000, the filing fee is $775; if the claim is between $75,000 and $150,000, the fee is $2,600 (an initial fee of $1,850 and a final fee of $750). Plaintiffs argue that they will be subject to the $2,600 fee, which is prohibitively expensive and creates a one-sided contract (in contrast, the AAA filing fee for employment disputes is $175, and the filing fee for cases filed in the Northern District of California is $375). MHN argues that plaintiffs have not adequately shown that they will not be subject to the lowest filing fee. They argue that the $775 fee is "only" $400 more than this district's fee, and that this slightly higher fee will be

offset by the cost-savings due to the efficiency of arbitration.

Plaintiffs have pled in good faith that their claims exceed $75,000. *See* Zaborowski Decl. ¶ 34; Badini Decl. ¶ 10. Thus, they would be subject to the $2,600 fee, which is over seven times greater than the fee in this district, and almost fifteen times greater than the AAA fee for employment disputes. Under California law, significant forum fees, especially in suits against employers, are unconscionable. *Armendariz*, 24 Cal. 4th at 111-12. Accordingly, the Court finds this provision unconscionable.

5. Fees and Costs

Additionally, plaintiffs argue that the allocation of attorneys' fees and costs in the Agreement is unconscionable. Both California law and the FLSA require an award of fees and costs to the prevailing plaintiff, but not to the prevailing defendant. 29 U.S.C. § 216(b); Cal. Labor Code § 1194(a). The Agreement, however, has a fee shifting provision which provides that "[t]he prevailing party, or substantially prevailing party's costs of arbitration, are to be borne by the other party, including reasonable attorney's fees." FAC, Ex. A ¶ 20. Thus, contrary to California and federal law, if the employer prevails in a wage dispute, then the plaintiffs will be liable for the employer's costs and fees under the Agreement.

California and federal law recognize that contractor/employee plaintiffs are generally individuals, and often cannot afford to pay for the

sophisticated and expensive legal costs of a business employer. To allow attorney fee and cost shifting from the business employer back onto the contractor/employee could be disproportionately burdensome to plaintiffs, creating an advantage for employers. *See Armendariz*, 24 Cal. 4th at 110-11 (holding that an arbitration agreement is substantively unconscionable if it "require[s] the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court") (emphasis in original); *see also Laughlin v. VMware, Inc.*, 5:11-CV-00530 EJD, 2012 WL 298230, at *6 (N.D. Cal. Feb. 1, 2012) (finding unconscionable provisions that prevented the employee from recovering fees or costs if she prevailed). Thus, under California law, the fee shifting provision is unconscionable.

6. Punitive Damages

"California courts have repeatedly refused to enforce contractual limitations on statutorily imposed remedies such as punitive damages as unconscionable, based primarily on the rationale that the remedies are important to the effectuation of that statute's policy." *Captain Bounce, Inc. v. Bus. Fin. Services, Inc.*, 11-CV-858 JLS WMC, 2012 WL 928412, at *10 (S.D. Cal. Mar. 19, 2012) (citing *Armendariz*, 24 Cal. 4th at 103). This is especially true in the employment context, because an employer may be subject to substantial punitive damages that would likely not be assessed against an individual employee or contractor. Enforcing such a provision would thwart the legislative decision to use punitive

damages as a method of ensuring compliance from employers.

The Agreement provides that "[t]he arbitrator shall have no authority . . . to award punitive damages." FAC, Ex. A ¶ 20. MHN argues that the Agreement should be interpreted to preclude only common law punitive damages, not statutory punitive damages. However, this is contrary to the plain language of the Agreement, which does not qualify what type of punitive damages are prohibited. Under the terms of the Agreement, the MFL Consultants would not be able to recover any punitive damages they are seeking.

The Court finds that the limitation of punitive damages is one-sided in this context, and therefore unconscionable.

7. Enforcement of the Agreement

The Agreement provides that "[t]he arbitrator shall have no authority to . . . add to, modify, or refuse to enforce any agreements between the parties." FAC, Ex. A ¶ 20. Plaintiffs argue that, because the Agreement labels the MFL Consultants as "independent contractors," an arbitrator will have no choice but to follow the definition provided in the contract. This is in direct contradiction to the FLSA, under which "[e]conomic realities, not contractual labels, determine employment status." *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 755 (9th Cir. 1979). Therefore, plaintiffs argue, this provision is unconscionable because it does not afford them their rights under the law.

However, the Agreement also states that "[t]he arbitrators shall have no authority to make material errors of law" and "shall have no authority to make any award that could not have been made by a court of law." In reading these provisions together, the Court interprets the Agreement to require the arbitrator to interpret the contract under the law, including the FLSA. *See AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (holding that a court must choose amongst reasonable interpretations the one that allows for arbitration). Therefore, under the Agreement, the arbitrator would not and could not be bound by the contractual label of "independent contractor," and would be required to apply the economic reality test.

Thus, the Court finds that this provision of the Agreement is not unconscionable.

8. Forum in San Francisco

Finally, plaintiffs argue that the Agreement's requirement that "[t]he arbitration shall be conducted in San Francisco, California" is unconscionable. They point to the fact that MFL Consultants work for MHN across the country and throughout the world, and therefore travel to San Francisco is unduly oppressive. Under California law, a forum selection clause is analyzed by taking into account the "respective circumstances of the parties." *Bolter v. Superior Court*, 87 Cal. App. 4th 900, 908 (2001) (finding the forum selection provision "unduly oppressive" where small "Mom and Pop" franchisees located in California were required to travel to Utah to arbitrate their claims against an international

carpet-cleaning franchisor); *see also Nagrampa*, 469 F.3d at 1288-90 (finding Boston forum unconscionable because it was so prohibitively expensive that the individual plaintiff was essentially unable to litigate her claim).

Although plaintiffs are able to assert a compelling hypothetical argument as to why this provision would be unconscionable to an MFL Consultant stationed in Germany (or in Djibouti, as was argued at the hearing), the facts here do not support this claim. After all, plaintiffs chose to file their suit in San Francisco, exactly where the forum selection clause would have them undergo arbitration. This clause did not "diminish in any way the substantive rights afforded California [plaintiffs] under California law." *Id.* at 1289 (quoting *Am. Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1, 10-11 (2001)). It also appears that the Hawaii, Kentucky, and Nevada plaintiffs similarly did not find it prohibitively difficult to assert their claim in San Francisco.

Therefore, the Court finds that plaintiffs have not met their burden in showing that the forum selection clause is unconscionable.

II. Severability

California law allows courts to sever an unconscionable contract provision or strike the contract in its entirety. *See* Cal. Civ. Code § 1670.5(a). The California Supreme Court has construed § 1670.5(a) as giving "a trial court some discretion as to whether to sever or restrict the unconscionable

provision or whether to refuse to enforce the entire agreement." *Armendariz*, 24 Cal. 4th at 122. "The question is whether the offending clause or clauses are merely 'collateral' to the main purpose of the arbitration agreement, or whether the [arbitration agreement] is 'permeated' by unconscionability." *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1084 (9th Cir. 2007) (citing *id.* at 123-24).

The Court has found that the contract is procedurally unconscionable and contains multiple substantively unconscionable provisions. The finding of "multiple unlawful provisions" allows a trial court to conclude that "the arbitration agreement is permeated by an unlawful purpose." *Armendariz*, 24 Cal. 4th at 124. *Compare Davis*, 485 F.3d at 1084 (finding four unconscionable provisions unseverable because they "cannot be stricken or excised without gutting the agreement"), *and Graham Oil Co. v. Arco Products Co.*, 43 F.3d 1244, 1247 (9th Cir. 1994) (finding an arbitration clause that waived punitive damages and attorneys' fees remedies available to plaintiff as unenforceable), *with Lara v. Onsite Health, Inc.*, CV 12-3337 MEJ, 2012 WL 4097712, at *13 (N.D. Cal. Sept. 17, 2012) (finding the single substantively unconscionable provision barring injunctive relief severable because the provision is "collateral to the main purpose of the contract" and not even implicated by the plaintiff's case), *and Grabowski v. Robinson*, 817 F Supp. 2d 1159, 1179 (S.D. Cal. 2011) (finding that the arbitration agreement is not "permeated with unconscionability" and the three substantively unconscionable provisions may be severed).

The Court finds that the Agreement is so permeated with unconscionability that it is not severable. It is an adhesive contract that contains oppression and surprise. The Agreement's substantively unconscionable provisions range from the method of selecting the arbitrator, the shortened statute of limitations, and limits on statutory remedies, to the filing fees and the allocation of fees and costs. The Court could not "attempt to ameliorate the unconscionable aspects" of the Agreement without being required to "assume the role of contract author rather than interpreter." *Ingle*, 328 F.3d at 1180.

Accordingly, the Court finds that the unconscionable provisions of the arbitration agreement are not severable.

CONCLUSION

For the foregoing reasons, the Court DENIES defendants' motion to compel arbitration. Docket No. 15.

IT IS SO ORDERED.

Dated: April 3, 2013

SUSAN ILLSTON
United States District
Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[FILED FEB 09 2015 Molly C. Dwyer, Clerk U.S. COURT OF APPEALS]

THOMAS ZABOROWSKI; et al.,

Plaintiffs - Appellees,

v.

MHN GOVERNMENT SERVICES, INC.; MANAGED HEALTH NETWORK, INC.,

Defendants-Appellants.

No. 13-15671

D.C. No. 3:12-cv-05109-SI

Northern District of California, San Francisco

ORDER

Before: GOULD and WATFORD, Circuit Judges, and MARTINEZ, District Judge.*

Judge Gould votes to grant the petition for rehearing en banc.

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* The Honorable Ricardo S. Martinez, District Judge for the U.S. District Court for the Western District of Washington, sitting by designation.

Judge Watford votes to deny the petition for rehearing en banc, and Judge Martinez so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc, filed January 14, 2015, is DENIED.

APPENDIX E

PROVIDER SERVICES TASK ORDER AGREEMENT

This Agreement is made by and between the provider named on the signature page of this Agreement ("Provider") and MHN Government Services, Inc., (hereinafter referred to as "MHN"). The effective date of this Agreement is set forth on its signature page.

Recitals:

WHEREAS, the Provider has the legal authority to enter into this Agreement and to deliver or arrange for the delivery of short term, situational, problem solving non-medical counseling support services and **WHEREAS**, the Provider acknowledges and accepts that the location of the performance of Services may be under a travel warning issued by the United States Department of State or other similar agency and may be an area of long-term, protracted conditions that make a country or region dangerous or unstable and **WHEREAS**, MHN desires to engage the Provider to provide counseling services.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and promises contained herein, and intending to be bound hereby, the parties agree as follows:

1. Provider Services.

(a) Services. During the term of this Agreement, Provider shall deliver or arrange the services set forth in the Task Orders attached hereto or

issued in the future and made a part of this Agreement (the "Services").

(b) **No Additional Work Obligation.** Provider agrees that MHN is not obligated to issue new assignments or any additional assignments for work by Provider under this Agreement. Furthermore, MHN's issuance of an assignment does not guarantee that Provider will be permitted to initiate or carry such assignment out until completion. Provider acknowledges and agrees that his or her Services may be terminated at any time with or without cause as provided in this Agreement.

(c) **Additional Duties.** Provider shall perform such additional duties in furtherance of the subject matter of this Agreement as may be requested by MHN from time to time upon mutual written agreement between the parties.

(d) **Professional Liability Insurance.** Provider shall maintain professional liability insurance in the amount of one million dollars ($1,000,000) per claim and one million dollars ($1,000,000) in the aggregate of all claims per policy year. Provider agrees to provide MHN with written evidence, acceptable to MHN, of such insurance coverage in accordance with MHN's credentialing and recredentialing requirements and naming MHN, and the U.S. federal government, as additional insureds. Provider also agrees to notify, or to ensure that its insurance carriers notify, MHN at least

thirty (30) days prior to any proposed termination, cancellation or material modification of any policy for all or any portion of the coverage required herein. Notwithstanding any insurance coverages of Provider, nothing in Section 1(d) shall be deemed to limit or nullify Provider's indemnification obligations under this Agreement. Provider agrees to waive any rights of subrogation that Provider may have against MHN, or the U.S. federal government under applicable insurance policies related to the work performed by Provider. Indemnification by Provider shall not be limited or reduced by any insurance coverage limitations. Provider shall make certain that any and all subcontractors hired by Provider are insured in accordance with this Agreement. If any subcontractor's coverage does not comply with the provisions herein, Provider shall indemnify and hold MHN harmless of and from any damage, loss, cost or expense, including attorneys' fees, incurred by MHN as a result thereof.

(e) **No or Limited Liability of MHN and Other Insurance Coverage.** MHN may. in some instances, maintain certain insurance coverage the benefit of which may extend to Provider. MHN's liability to Provider or any third party is limited to the extent of such coverage. As such, Provider acknowledges that there may be a need for Provider, at Provider's discretion, to further obtain and maintain other insurance policies as MHN or Provider may reasonably

deem necessary, including without limitation medical, disability, worker's compensation, home owner's, and rescue/evacuation insurance in the event of medical emergency or death. In the instance, where no insurance coverage is maintained by MHN the benefit of which may extend to Provider, MHN shall have no liability to Provider or any third party including acts of negligence on the part of provider or damage or theft of Provider's personal property. Nothing contained herein shall be interpreted or construed to require that MHN have any such insurance coverage, or if it has it, to continue to retain it or otherwise prevent MHN from modifying or eliminating such coverage in the future. Further, MHN shall have no obligation to provide insurance to Provider, or, if it maintains insurance that does cover Provider, from making any changes or otherwise terminating such coverage as it may pertain to Provider.

(f) **Credentialing.** Provider shall comply with MHN's credentialing and recredentialing requirements.

(g) **Professional Provider.** If Provider is a group practice, Professional Providers are the health care providers who contract with Provider, or are employed by Provider, and who have been credentialed and accepted by MHN to provide the Services described herein. Professional Providers accepted by MHN are limited to the Professional Providers named in the Task

Orders. Furthermore, Provider has the unqualified authority to and hereby binds itself, and any Professional Providers covered by this Agreement (referred to herein collectively as "Provider"), to the terms and conditions of this Agreement and the Task Order(s) referenced herein.

(h) **Military and Family Lite Consultant (MFLC) Provider Manual.** The MFLC Provider Manual issued by MHN, as updated from time to time, is incorporated into this Agreement by this reference and available on MHN's website or on hardcopy upon request. Provider agrees to be contractually bound to comply with the MFLC Provider Manual, and any updates or revisions to such, which arc effective as of the date of each respective Task Order accepted hereunder. In the event that any provision in the MFLC Provider Manual or any updates thereto are clearly inconsistent with the terms of this Agreement, the terms of this Agreement, including any amendments, shall prevail.

(i) **MFLC Quality Assurance Surveillance Plan (QASP).** The QASP is designed to meet MHN standards approved by the Department of the Defense, and is designed to monitor the quality and appropriateness of the Services provided hereunder. Relevant provisions of the QASP requirements and procedures are included in the MFLC Provider Manual, which should be reviewed by Provider upon execution of this Agreement.

2. **Task Orders.**

(a) MHN, solely at its discretion, may issue Task Orders under this Agreement to the Provider calling for the provision of the Services. The Task Order will include the following minimum information:

2.a.1 Task Order Number and MHN's Contract/Subcontract Number.

2.a.2 Description of ordered Services.

2.a.3 Location where Services are to be performed by Provider.

2.a.4 Period of performance.

2.a.5 Invoicing and Payment Terms.

2.a.6 Rate of payment for the services, applicable Non-Labor expenses, and Ceiling Price.

2.a.7 Professional Provider(s) approved for assignment.

2.a.8 Appendix A specifying the terms and conditions for the assignment(s) covered by the Task Order.

(b) Prior to the issuance of a Task Order, MHN shall advise the Provider of the details of required performance (as depicted in 2.a.2 thru 2.a.4 above. Provider shall detail the name(s) of the Professional Providers(s) that Provider

proposes to use to conduct the services. All Professional Providers named by Provider must be credentialed and approved by MHN. Provider shall not substitute named Professional Providers without the express written authorization of MHN.

(c) MHN will issue the Task Order to the Provider and shall name the Professional Provider agreed upon. Upon receipt of the Task Order, Provider agrees to notify MHN within two (2) business days via email of the Provider's decision to "decline" all Task Orders issued hereunder. If WIN does not receive such a written declination within two (2) business days, this shall constitute Provider's acceptance of the Task Order and Provider's agreement to performance thereunder.

(d) **Rate of Payment.** During the term of this Agreement, MHN shall pay to Provider as full compensation for the Services provided the Rate of Payment specified in the Task Order issued hereunder. The Rate of Payment is for labor only and excludes compensation for business expenses and if applicable per diem payments and payment for travel time.

3. **Invoicing and Payment.**

(a) **Services.** MHN shall pay to Provider as full compensation for the Services provided under any resulting Task Order, the Rate of Payment stated in such Task Order for such services. MHN, however, may pay for partial delivery of

services, based upon Provider's submission of a properly prepared invoice, as stated below. In addition, MHN may pay for necessary and reasonable business expenses incurred by Provider directly related to performance of Services, if such expenses are expressly allowed under the individual Task Orders issued hereunder and are in accordance with requirements set forth in the MFLC Provider Manual. If applicable, and if stipulated in the individual Task Orders issued hereunder, air travel arrangements, hotels and rental cars must be booked by MHN through MHN's travel office, in accordance with MHN's Travel Expense Policy. Relevant portions of the Travel Expense Policy are included in the MLFC Provider Manual, which should be reviewed by Provider upon execution of this Agreement. In the event that the Task Order does provide for payment of such expenses, the nature and type of the same shall be as identified by the Task Order.

(b) **Invoice and Expense Report Submissions.** Provider shall submit invoices and expense reports ("Invoices") in accordance with the terms and conditions set forth in the Task Order and MFLC Provider Manual. Consistent submission of timely Invoices is a condition of continued participation under this Agreement.

(c) **Timely Filing of Invoices.** Payment under this Agreement and any assignment hereunder shall be conditioned upon Provider submitting complete, timely and accurate invoices and

expense reports for services performed and allowable expenses incurred, in accordance with the submission requirements hereunder. Provider expressly acknowledges its understanding and agreement, that a Final Invoice must be submitted within thirty (30) calendar days from the Assignment Period End Date set forth in the Task Order, in order to be considered timely submitted. Such Final Invoice shall be so marked, and shall include all previously unbilled amounts, if any. In the event that Provider fails to submit a timely Final Invoice, MHN shall consider the last invoice submitted by Provider, under the respective Task Order, as the Provider's Final Invoice, and once paid by MHN, no further amounts will be considered due nor owed the Provider, and MHN shall have no obligation for further payments. Notwithstanding the foregoing, in the event that MHN denies an invoice submitted after the 30-day deadline on the basis that it was not submitted timely, upon demonstration by Provider of good cause for the delay through the provider dispute resolution process specified in the MFLC Provider Manual, MHN will reprocess the invoice as if it were timely.

(d) **Form W-9.** Payment under this Agreement and any assignment hereunder shall be conditioned upon Provider submitting a completed and signed "Form W-9," Taxpayer Identification Number Request, as set forth in the MFLC Provider Manual.

4. **Term and Termination.**

(a) **Effective Date.** This Agreement shall become effective as of the date set forth on the signature page and shall remain in full force and effect, unless otherwise terminated as provided herein.

(b) **Termination Without Cause.** This Agreement may be terminated without cause by either party at any time upon thirty (30) calendar days prior written notice to the other party. Prior to the assigned assignment start date set forth in the Task Order, MHN may terminate the assignment under such Task Order without cause upon five (5) calendar days written notice. Notwithstanding the foregoing, MHN or DoD may cancel any assignment under a Task Order at any time for any reason or no reason at all. In the event that MHN cancels an assignment under a Task Order without cause less than five days prior to the Assignment Start Date, MHN agrees to pay Provider the equivalent of one week's pay based on the Payment Rate and estimated number of hours per week specified in the applicable Task Order.

(c) **Cancellation for Default.** Either party may terminate this Agreement or any assignment under a Task Order upon fourteen (14) calendar days prior written notice to the other party if the party to whom such notice is given is in material breach of this Agreement and/or such Task Order. The party claiming the right

to terminate hereunder shall set forth in the notice of intended termination the facts underlying its claims that the other party is in material breach of this Agreement and/or such Task Order. Remedy of such breach to the satisfaction of the party giving notice of intended termination within fourteen (14) calendar days of receipt of such notice shall revive the Agreement and/or such Task Order. Provider may not perform Services during any cure period.

(d) **Immediate Termination.** This Agreement and/or an assignment under a Task Order shall immediately terminate upon notice to the effected party in the event of the occurrence of any of the following:

4.d.1 Either party's violation of law or regulation pertinent to this Agreement and/or such Task Order, upon notice of said violation;

4.d.2 any act or conduct for which any of Provider's license, certifications or accreditation, to provide Services may be revoked or suspended or for which Provider's ability to provide Services in accordance with this Agreement and/or such Task Order is otherwise materially impaired;

4.d.3 any misrepresentation or fraud by either party, upon notice to such party;

4.d.4 Provider's failure to adhere to MHN's credentialing requirements as determined by the MHN Credentialing Committee or failure to maintain professional liability insurance in accordance with this Agreement;

4.d.5 MHN's determination that the health, safety or welfare of any participant may be in jeopardy if this Agreement and/or such Task Order is not terminated;

4.d.6 MHN's determination in its sole discretion that Provider is not able to perform according to the standards of MHN and the Department of Defense; or

4.d.7 Provider voluntarily or involuntarily terminates from the MHN commercial network; or

4.d.8 MHN's customer's cancellation, or failure to renew/extend, the MHN contract and/or assignment named in Task Order.

4.d.9 Any act or conduct by the Provider which results in any violation of applicable U.S., or state law or regulations, or the law of any country where the Provider is providing services, including, but not limited to the U.S. Foreign Corrupt Practices Act, Export Administration Act, Foreign Asset Control Act and regulations, Arms Export Control Act

and regulations, or any breach of any covenant condition or representation and warranty contained herein.

5. **Records and Audits.** As a condition of payment for Services Provider shall maintain and submit accurate reports and records, in accordance with the MFLC Provider Manual and as provided and requested by the Supervisor or another representative of MHN.

6. **Confidential and Proprietary Information.**

(a) **Work for Hire.** The parties agree that all reports, documents, materials and other works originated, created, prepared or produced by Provider in providing Services under this Agreement and all ideas, concepts, know-how, show-how, techniques, software, computer code, algorithms, inventions, discoveries or improvements developed, conceived, created or first reduced to practice in the performance of this Agreement shall be the sole and exclusive property of MHN and shall constitute "work for hire."

(b) **Department of Defense Premises.** Provider is hereby expressly prohibited from entering area(s) other than the work area(s) designated by MHN. Any failure to adhere to this requirement shall constitute a material breach of this Agreement by the Provider.

(c) **Confidentiality Provisions.** The parties hereby agree to hold all confidential or proprietary information or trade secrets of each other in trust and confidence and agree that such information shall be used only for the purposes contemplated herein, and shall not be used for any other purpose. Moreover, it is understood that Provider and MHN shall release patient-related behavioral health information and records that contain individual identifying information and Provider-specific information only in accordance with applicable state and federal laws. Provider also shall keep strictly confidential all compensation arrangements set forth in this Agreement and its addenda.

(d) **No Client Contact.** Provider agrees that under no circumstances shall Provider contact any MHN client, including without limitation, the Department of Defense, without the express prior written consent of MHN. For the purpose of this Agreement, TRICARE beneficiaries are not considered an MHN client. Provider further acknowledges that member and client group medical and financial information shall remain the property of MHN, shall be deemed confidential, and shall not be disclosed or removed from Department of Defense facilities without the express prior written consent of MHN.

(e) Provider understands that any information obtained by Provider from a victim of domestic abuse is protected by the Privacy Act of 1974

and any unauthorized disclosures of client information may result in the imposition of possible criminal penalties.

(g) Provider shall follow appropriate administrative and physical safeguards to ensure the security and confidentiality of client records and to protect against any anticipated threats or hazards to their security or integrity that could result in substantial harm, embarrassment, inconvenience, or unfairness to the client.

(h) Provider agrees to protect the confidentiality of Government records, client or otherwise, which are not public information.

(i) Information made available to Provider by MHN for the performance or administration of this effort shall be used only for those purposes and shall not be used in any other way without the written agreement of MHN.

(j) If public information is provided to Provider for use in performance or administration of this effort, except with the written permission of MHN, Provider may not use such information for any other purpose. If Provider is uncertain about the availability or proposed use of information provided for the performance or administration, Provider will consult with MHN regarding use of that information for other purposes.

(k) Provider agrees to protect the confidentiality of Government records that are not public information.

(l) Performance of this effort may require Provider to access and use data and information proprietary to a Government agency or Government contractor which is of such a nature that its dissemination or use, other than in performance of this effort, would be adverse to the interests of the Government and/or others.

(m)Provider shall not divulge or release data or information developed or obtained in performance of this effort, until made public by the Government, except to authorized Government personnel or upon written approval of MHN. Provider shall not use, disclose, or reproduce proprietary data that bears a restrictive legend, other than as required in the performance of this effort. Nothing herein shall preclude the use of any data independently acquired by Provider without such limitations or prohibit an agreement at not [sic] cost to the Government between Provider and the data owner that provides for greater rights to Provider.

(n) All data received, processed, evaluated, loaded, and/or created as a result of this Agreement or resulting Task Orders, shall remain the sole property of MHN or the Government unless specific exception is granted by MHN, or the Contracting Officer directly through MHN.

(o) This Section 5 shall survive the termination of this Agreement for any reason.

(p) Failure to comply with the requirements of this Section 6 shall constitute a material breach of this Agreement.

7. **Warranties.**

(a) Provider represents and warrants that it has the full right and authority to execute and deliver this Agreement and to perform its obligations under this Agreement, and that neither the execution nor delivery of this Agreement by Provider nor consummation of the transactions contemplated hereby will result in a breach or default under the terms and conditions of any contract, Task Order, license, charter document or other agreement by which Provider is bound.

(b) Provider represents and warrants that the Services provided under this Agreement or any Task Order will be performed in a professional and workman-like manner by qualified personnel, and that Provider is appropriately licensed, certified and qualified to provide the Services.

(c) Provider affirms that to the best of Provider's knowledge, there exists no actual or potential conflict between Provider's family, business, or financial interest and performance of the Services under this Agreement, and in the event of change in either Provider's private

interest or Services under this Agreement, Provider will raise with MHN any question regarding possible conflicts of interest which may arise as a result of such change. Treatment of TRICARE beneficiaries in the Provider's private practice does not constitute a conflict of interest.

(d) Provider represents and warrants that each person providing Services under this Agreement is physically fit and in good physical condition and has been screened to identify any medical conditions that might limit his or her ability to perform Services in the location(s) where Services must be performed. It is the responsibility of Provider's medical examiner to use sound medical judgment to determine fitness of each person to provide Services. If any medical condition is identified that may limit his or her ability to perform Services, but which condition is not considered disqualifying by Provider's physician, the Provider shall obtain from the examining physician, in writing, a statement of the reasons why the finding is not likely to limit performance or cause undue risk to the Provider or others in the performance of Services.

(e) Provider represents and warrants that each Provider and Provider's physician has reviewed the required and recommended vaccinations, which requirements and recommendations are issued by the United States Department of State, the Centers for

Disease Control and Prevention, and/or other similar agency/resource for each location where Services are to be performed, and that each Provider has received such required and recommended vaccinations in a timely manner prior to being deployed to or performing any Services in such location.

(f) Provider represents and warrants that each person providing Services under this Agreement has not and will not violate the any law or regulation of the United States or any state, including, but not limited to the Foreign Corrupt Practices Act, Export Administration Act, Foreign Asset Control Act and regulations, Arms Export Control Act and regulations or any law of any country where the Provider is providing Services.

(g) Provider represents and warrants that each person providing Services under this Agreement has reviewed the travel warnings and security advice as issued by the United States Department of State or other similar agencies and understands the reported risks of each location where Services will be performed.

8. **Indemnification by Provider.** Provider shall indemnify MHN, its directors, officers, agents, and employees from and against any and all liabilities, suits, claims, losses, damages, costs, attorneys' fees, and expenses whatsoever arising from any breach of a representation or warranty hereunder or any act or omission of Provider, its agents, or

employees during the performance of any of its obligations under this Agreement. Upon request of and at no expense to MHN, Provider shall defend any suit asserting a claim for any loss, damage or liability specified above, and Provider shall pay any such costs incurred in enforcing the indemnity granted above; provided that Provider shall not enter into a settlement of any such suit or claim without the prior written consent of MHN. Provider and its employees shall comply with all applicable laws, ordinance(s), codes and regulations; and Provider hereby indemnifies and agrees to hold MHN harmless from and against all liabilities and penalties imposed or failure to do so.

9. **Relationship of Parties.** MHN and Provider are independent contractors in relation to one another and no joint venture, partnership, employment, agency or other relationship is created by this Agreement. Neither MHN nor Provider is authorized to represent the other for any purposes. Neither of the parties hereto, nor any of their respective officers, agents or employees shall be construed to be the officer, agent or employee of the other party.

10. **Headings.** The section and paragraph headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

11. **Assignment.** Provider shall not assign, sell or transfer this Agreement or any interest therein without the prior written consent of MHN, and any unauthorized assignment or transfer of this Agreement or any interest therein shall be null and void. MHN reserves the right to assign this Agreement or any Task Order to any present or future affiliate, subsidiary or parent corporation. MHN Government Services is an affiliate of Managed Health Network, Inc., and MHN at its sole discretion may assign this Agreement to Managed Health Network, Inc. Subject to the provisions of this Section 10, this Agreement shall inure to the benefit of and be binding upon the respective successors and assigns, of any of the parties hereto. Provider shall not assign this Agreement without the prior written authorization of MHN; such authorization shall not be unreasonably withheld.

12. **Waiver.** Waiver of a breach of any provision of this Agreement shall not be deemed a waiver of any other breach of the same or different provision.

13. **Severability.** In the event that any provision of this Agreement is rendered invalid or unenforceable by any valid law or regulation of the State of California or of the United States, or declared void by any tribunal of competent jurisdiction, the remaining provisions of this Agreement shall remain in full force and effect.

14. **Modification.** This Agreement or any part or section of it can be amended only by mutual written consent of the parties.

15. **Notices.** Any notice required or desired to be given under this Agreement shall be in writing. Notices shall be deemed given five (5) days post deposit in the U.S. mail, postage prepaid. If sent by hand delivery, overnight courier, or facsimile, notices shall be deemed given upon documentation of receipt. All notices to the Provider shall be addressed to the applicable address appearing on the signature page of the Agreement. The addresses to which notices are to be sent may be changed by written notice given in accordance with this Section. All notices to MHN shall be as follows:_____

MHN Services
Professional Relations Department
P.O. Box 10086
San Rafael, CA 94912
Fax: (866) 581-9533
Ann: Vice President Professional Relations

16. **No Third Party Beneficiary.** Nothing in this Agreement, express or implied, is intended or shall be construed to confer upon any person, firm, or corporation other than the parties hereto and their respective successors or assigns, any remedy or claim under or by reason of this Agreement or any term, covenant, or condition hereof, as third party

beneficiaries or otherwise, and all of the terms, covenants, and conditions hereof shall be for the sole and exclusive benefit of the parties hereto and their successors and assigns.

17. **Compliance with Applicable Laws.** Provider and its employees shall comply with all applicable laws, regulations, ordinances and codes, including the procurement of permits and licenses when required, in the performance of this Agreement. Provider shall hold harmless and indemnify MHN against any loss, damage, penalties or liabilities that may occur by reason of Provider's failure to comply with such laws, regulations and codes.

18. **Survival.** The provisions contained in this Agreement that by their nature and context are intended to survive the completion and performance, cancellation or termination of this Agreement or any Task Order hereunder, shall so survive.

19. **Governing Law.** This Agreement shall be governed by and construed according to the laws of the State of California.

20. **Mandatory Arbitration.** The parties agree to meet and confer in good faith to resolve any problems or disputes that may arise under this Agreement. Such negotiation shall be a condition precedent to the filing of any arbitration demand by either party. The parties agree that any controversy or claim arising out of or relating to this Agreement (and any

previous agreement between the parties if this Agreement supersedes such prior agreement) or the breach thereof, whether involving a claim in tort, contract or otherwise, shall be settled by final and binding arbitration in accordance with the provisions of the American Arbitration Association. The parties waive their right to a jury or court trial. The arbitration shall be conducted in San Francisco, California. A single, neutral arbitrator who is licensed to practice law shall conduct the arbitration. The complaining party serving a written demand for arbitration upon the other party initiates these arbitration proceedings. The written demand shall contain a detailed statement of the matter and facts supporting the demand and include copies of all related documents. MHN shall provide Provider with a list of three neutral arbitrators from which Provider shall select its choice of arbitrator for the arbitration. Each party shall have the right to take the deposition of one individual and any expert witness designated by another party. At least thirty (30) days before the arbitration, the parties must exchange lists of witnesses, including any experts (one of each for MHN and Provider), and copies of all exhibits to be used at the arbitration. Arbitration must be initiated within 6 months after the alleged controversy or claim occurred by submitting a written demand to the other party. The failure to initiate arbitration within that period constitutes an absolute bar to the institution of any proceedings. Judgment upon the award

rendered by the arbitrator may be entered in any court having competent jurisdiction. The decision of the arbitrator shall be final and binding. The arbitrator shall have no authority to make material errors of law or to award punitive damages or to add to, modify or refuse to enforce any agreements between the parties. The arbitrator shall make findings of fact and conclusions of law and shall have no authority to make any award that could not have been made by a court of law. The prevailing party, or substantially prevailing party's costs of arbitration, are to be borne by the other party, including reasonable attorney's fees.

21. **Entire Agreement.** This Agreement, inclusive of any Task Orders that may be issued hereunder, constitutes the entire Agreement of the parties with respect to the subject matter hereof. No promises, terms, conditions, or obligations other than those contained herein shall be valid or binding. Any prior agreements, statements, promises, either oral or written, made by any party or agent of any party that are not contained in this Agreement are of no force or effect.

22. **No Press or Public Contact.** Provider will not speak with the press or make any other public statement, press release or other announcement relating to the terms of or existence of this Agreement without the prior written approval of MHN, which approval may be withheld in MHN' sole discretion.

23. **Federal Acquisition Regulations (FAR).** Task Orders resulting from this Agreement shall constitute subcontracts issued under a U.S. federal government contract. All issued Task Orders are subject to the following requirements, as applicable, which are hereby incorporated by reference with the same force and effect as if set forth herein in full text. The full text of these clauses is available at: http://farsite.hill.dmilivffara.htm

(a) FAR 52.219-8, Utilization of Small Business Concerns (May 2004). [Applicable to subcontracts expected to exceed $100,000].

(b) FAR 52.222-26, Equal Opportunity (Apr 2002) (E,O. 11246). [Applicable if the value a single subcontract, or the combination of all Federally funded subcontracts in last 12 months, total $10,000 or more].

(c) FAR 52.222-35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (Dec 2001) (38 U.S.C. 4212). [Applicable if Expected Subcontract Value is $25,000 or more].

(d) FAR 52.222-36, Affirmative Action for Workers with Disabilities (June 1998) (29 U.S.C. 793). [Applies if subcontract is expected to exceed $10,000].

(e) FAR 52.222-39, Notification of Employee rights Concerning Payment of Union Dues or Fees

(Dec 2004) (E.O. 13201). [Applicable to subcontracts expected to exceed $100,000].

(f) FAR 52.222-41, Service Contract Act of 1965, as Amended (Jul 2005), flow down required for all subcontracts subject to the Service Contract Act of 1965 (41 U.S.C. 351, *et seq.*) [Applicable to subcontract expected to exceed $100,000).

(Signatures following on the next page)

In witness whereof, the parties have caused this Agreement to be executed by their respective duly authorized representatives as of the date first written above.

EFFECTIVE DATE. This agreement is effective on_____.

IN WITNESS WHEREOF, the parties hereto have entered into this agreement on the effective date specified.

PROVIDER NAME:	**MHN**
_____	**GOVERNMENT**
(Legal name/business that matches Tax ID# of SSN below)	**SERVICES, INC.**
_____	P.O Box 10086
Address	
_____	San Rafael, CA 94912
TEL:(__)_____	TEL: (800)688-8877

FAX:(__)_____ FAX: (866)581-9533

By:_____ By:_____

(Authorized Signature) (Authorized Signature)

Name:_____ Name: Denise Young

(Print Name)

Title:_____ Title: Manager, MHN Support Contacts

Date:_____ Date:_____

Federal Tax ID# or SSN:_____

(This is the number to which MHN will pay for services)

SUPREME COURT U.S.
FILED
AUG 24 2015
OFFICE OF THE CLERK

No. 14-1458

In The

Supreme Court of the United States

MHN GOVERNMENT SERVICES, INC., et al.,

Petitioners,

v.

THOMAS ZABOROWSKI, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit's unpublished memorandum disposition errs in recognizing that the Federal Arbitration Act does not preempt application of California's general law of contract severability to a contract with five distinct unconscionable provisions.

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STATUTORY PROVISION INVOLVED

California Civil Code Section 1670.5(a) provides:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

INTRODUCTION

California contract law authorizes trial courts to decide whether to sever unconscionable provisions from a contract or refuse to enforce the contract as a whole, depending on the degree of unconscionability. This discretion is guided by an equitable standard and applies to all contracts whether or not they involve arbitration. California state and federal courts exercise this discretion regularly. Sometimes they sever any unconscionable provisions and enforce the remainder of a contract; and sometimes, where the unconscionability is pervasive, they decline to sever, deeming the entire contract unenforceable.

Here, the district court exercised this discretion with respect to an arbitration agreement containing five substantively unconscionable provisions. Weighing the interests of justice and its capacity to

cure the agreement, the court decided against severing those provisions and enforcing the remainder. The court of appeals affirmed in an unpublished decision, correctly concluding that the district court had not abused its discretion. At the same time, the Washington Supreme Court held 9-0 that the very same agreement was permeated by unconscionability and unenforceable under California law. *See Brown v. MHN Gov't Servs., Inc.*, 178 Wash. 2d 258, 275-76 (2013). In all, over a dozen judges have refused to enforce Petitioners' agreement, finding that an array of unfair provisions permeate it with unconscionability.

Petitioners (collectively "MHN") do not contest here that their agreement has several unconscionable components. Instead they seek review of the court of appeals' non-precedential application of California's severance doctrine, claiming that it conflicts with precedent from this Court and other courts of appeals, and that it conflicts with the Federal Arbitration Act ("FAA") by discriminating against arbitration.

Petitioners are mistaken. California's severance doctrine derives from statutes that apply to all contracts and from cases dealing with contracts of various sorts—not just arbitration agreements. The doctrine applies to all contracts equally, consistent with the FAA and this Court's precedent. Where there are multiple unconscionable provisions, the doctrine neither requires nor prohibits severance, but instead vests discretion in the trial court. In short,

Petitioners complain about the court of appeals' application of arbitration-neutral statutory and case law that is consistent with the FAA and this Court's interpretation of it.

The court of appeals' decision does not create a conflict with the courts of appeals cited by Petitioners, both because it creates no precedent (being unpublished) and because it is fully consistent with the decisions of those courts. To the extent that they address severability at all, those decisions simply reflect the well-recognized fact that agreements with one or two unconscionable provisions can often be severed and enforced. None of them hold that an agreement as rife with unconscionability as this one must always be enforced. In fact, most of them explicitly acknowledge that agreements can be so unconscionable as to be unenforceable. Given the large number of unconscionable provisions that permeate Petitioners' agreement with unconscionability, there is no reason to think that these courts would have reached a different result in this case.

Petitioners may regret crafting an arbitration contract so tainted by unconscionability. In fact, soon after this case was filed, Petitioners redrafted their arbitration contract in a much fairer way, abandoning seven elements criticized by Respondents in this litigation, and began using this restructured version with new employees. *See* App. 22a-24a. But in this litigation, Petitioners are still responsible for their original choice. They cannot escape the consequences of their initial overreaching by offering to withdraw

unconscionable terms after the fact, as more than a dozen judges have found.

Finally, this case is a poor vehicle for review because the California Supreme Court has recently decided a major case concerning the scope of California's unconscionability doctrine, and many cases involving severability that had been deferred pending that decision are likely to be reconsidered in the near future.

STATEMENT

This petition arises from a conditionally certified collective action under the Fair Labor Standards Act ("FLSA") on behalf of 751 Military and Family Life Consultants who provide financial counseling, child services, and victim advocacy counseling at U.S. Military installations nationwide. Respondents allege that MHN, a behavioral health subcontractor to the Federal Government, misclassified them as independent contractors and as exempt from the overtime pay protections of the FLSA and various state laws. They seek overtime wages and other classwide relief.

Respondents filed this action in October 2012. MHN moved to compel arbitration in November 2012. The district court denied MHN's motion in April 2013. Pet. App. 30a. The court found that under California law, MHN's arbitration agreement was procedurally unconscionable, *id.* at 19a, and five of its provisions were substantively unconscionable. *Id.* at 21a-22a,

24a-26a (truncated statute of limitations, arbitrator selection clause stacked in the drafter's favor, imposition of onerous fees on non-drafting parties, potential liability for attorneys' fees and costs against prevailing party in contravention of federal and state law, and limitation on punitive damages). The district court noted that California law gives trial courts discretion whether to sever (or restrict) unconscionable provisions or refuse to enforce the entire agreement. *Id.* at 28a-29a (citing Cal. Civ. Code § 1670.5(a) and *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 122 (2000)). Following Ninth Circuit precedent applying California law, the court turned its attention to "whether the offending clause or clauses are merely 'collateral' to the main purpose of the arbitration agreement, or whether the [arbitration agreement] is 'permeated' by unconscionability." *Id.* at 29a (alteration in original) (quoting *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1084 (9th Cir. 2007)). The district court then noted that "[t]he finding of 'multiple unlawful provisions' allows a trial court to conclude that 'the arbitration agreement is permeated by an unlawful purpose.'" *Id.* (quoting *Armendariz*, 24 Cal. 4th at 124). To illustrate its discretion, the district court compared, on the one hand, two cases in which multiple unconscionable provisions were not severed, *id.* (citing *Davis*, 485 F.3d at 1084, and *Graham Oil Co. v. Arco Prods. Co.*, 43 F.3d 1244, 1247 (9th Cir. 1994)), with, on the other hand, two cases in which one and three unconscionable provisions were severed, respectively. *Id.* (citing *Lara v. Onsite Health, Inc.*, 896 F. Supp. 2d 831, 848 (N.D.

Cal. 2012), and *Grabowski v. Robinson*, 817 F. Supp. 2d 1159, 1179 (S.D. Cal. 2011)).

The district court concluded that Petitioners' arbitration agreement was "permeated with unconscionability" because it was "an adhesive contract that contains oppression and surprise," with "substantively unconscionable provisions rang[ing] from the method of selecting the arbitrator, the shortened statute of limitations, and limits on statutory remedies, to the filing fees and the allocation of fees and costs." *Id.* at 30a. Adding that "[t]he Court could not 'attempt to ameliorate the unconscionable aspects' of the Agreement without 'assum[ing] the role of contract author rather than interpreter,'" the district court concluded that the five unconscionable provisions were not severable. *Id.* (quoting *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003)). It therefore denied MHN's motion to compel arbitration.

The court of appeals affirmed in an unpublished memorandum disposition. Pet. App. 1a-2a. It agreed with the district court that MHN's arbitration agreement was procedurally unconscionable and that five of its provisions were substantively unconscionable. *Id.* at 2a-4a. The court of appeals further held that the district court had not abused its discretion by declining to sever the unconscionable provisions and enforce the remainder of the arbitration agreement. *Id.* at 5a. Acknowledging that the FAA "expresses a strong preference for the enforcement of arbitration agreements," the court also noted that "the Act does

not license a party with superior bargaining power 'to stack the deck unconscionably in [its] favor' when drafting the terms of an arbitration agreement." *Id.* (alteration in original) (quoting *Ingle*, 328 F.3d at 1180). The court noted that "[u]nder generally applicable severance principles, California courts refuse to sever when multiple provisions of the contract permeate the entire agreement with unconscionability." *Id.* (citing *Samaniego v. Empire Today LLC*, 205 Cal. App. 4th 1138, 1149 (2012)). Because the district court had found such permeation, and because that finding was not "illogical, implausible, or without support in inferences that may be drawn from the facts in the record," the court of appeals concluded that the district court had acted within its discretion in opting not to sever the five unconscionable provisions. *Id.* (quoting *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc)). Finally, the court of appeals held that its application of the "general principles of California unconscionability law" was balanced—not "impermissibly unfavorable to arbitration." *Id.* at 5a-6a (citing *Chavarria v. Ralph's Grocery Co.*, 733 F.3d 916, 926-27 (9th Cir. 2013)). The court of appeals found the district court's exercise of discretion to be consistent with the FAA's exception for generally applicable state contract laws that apply equally to all contracts, including arbitration agreements. *Id.*

Judge Gould dissented in part, explaining that he would have required severance. Pet. App. 7a-11a. In his view, the California Supreme Court in

Armendariz had reasoned that "multiple unconscionable provisions *will* render an arbitration agreement's purpose unlawful." *Id.* at 8a (emphasis added). Such reasoning, Judge Gould argued, "has 'a disproportionate impact on arbitration agreements' and should have been preempted by the" FAA. *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011)). In Judge Gould's view, "*Concepcion* and its progeny should create a presumption in favor of severance when an arbitration agreement contains a relatively small number of unconscionable provisions that can be meaningfully severed and after severing the unconscionable provisions, the arbitration agreement can still be enforced." *Id.* Judge Gould disagreed with the district court's determination that enforcing the remainder of the agreement would require the district court to "assume the role of contract author." *Id.* Although he "recognize[d] that one can imagine an arbitration agreement where the number and content of unconscionable provisions are so pervasive that they rebut the presumption in favor of severance," and that in such a case, "it would then be within a district court's discretion not to sever the unconscionable provisions and not to enforce the arbitration agreement," Judge Gould did "not view the challenged provisions here as being sufficient to rebut a presumption in favor of severance that I urge should arise under *Concepcion* on the facts here." *Id.* at 11a n.1.

MHN petitioned for rehearing en banc in January 2015. Pet. App. 32a. The petition was denied in

February 2015 with no judge on the panel or the court of appeals having requested a vote to rehear the matter en banc. *Id.*

REASONS FOR DENYING THE WRIT

Because the Ninth Circuit's decision is correct and does not conflict with any decision of this Court or another court of appeals, it does not warrant this Court's review.

I. California's Law of Contract Severability Treats All Contracts Equally and Is Therefore Consistent with the FAA.

This Court has made clear that arbitration agreements must be placed "on an equal footing with other contracts." *Concepcion*, 131 S. Ct. at 1745. Contract defenses that apply generally to all contracts may be applied to arbitration agreements in particular, so long as they are not "applied in a fashion that disfavors arbitration." *Id.* at 1746-47.

California, like many states, has a statute directing courts to avoid enforcement of unconscionable terms in contracts. The state legislature has provided that courts have the discretion to (1) refuse to enforce a contract containing unconscionable terms, (2) sever the unconscionable terms and enforce the remainder of the contract, or (3) limit the application of those unconscionable terms to avoid an unconscionable result. State and federal courts routinely exercise this

discretion in deciding whether to enforce arbitration and non-arbitration contracts alike. Sometimes they refuse to enforce the contract; sometimes they sever the offending provisions.

There is no categorical rule. Rather, factfinders must weigh the interests of justice. The standard is equitable and fact-specific, leaving room for reasonable disagreement as to whether severance is appropriate in a given case. California courts apply this standard evenhandedly to contracts of all kinds, including arbitration agreements. The outcomes vary with the specific facts of each case.

In line with this discretion, there are many examples of California courts severing unconscionable provisions to preserve and enforce arbitration agreements. Of course, some agreements are so permeated with unconscionability a trial court is within its discretion to conclude that no surgery can cure it. Petitioners' agreement, which contains *five* distinct unconscionable provisions, is a case in point.

A. California Severance Doctrine Derives from General Contract Law Codified by Statute and Applies in Arbitration and Non-Arbitration Cases Alike.

The California Legislature has given courts discretion to handle unconscionable contract provisions in one of three ways:

> If the court as a matter of law finds the contract or any clause of the contract to have

> been unconscionable at the time it was made [1] the court may refuse to enforce the contract, or [2] it may enforce the remainder of the contract without the unconscionable clause ["severance"], or [3] it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Cal. Civ. Code § 1670.5(a). This statute applies evenly to all contracts.

Section 1670.5(a) reflects an approach to unconscionability that has been widely adopted across the various States. It employs the exact language of § 2-302 of the Uniform Commercial Code, expanding coverage to noncommercial contracts. *Cf. IMO Dev. Corp. v. Dow Corning Corp.*, 135 Cal. App. 3d 451, 459 (1982) ("Section 1670.5 codifies the judicially developed doctrine of unconscionability and is identical to section 2-302 of the Uniform Commercial Code which has long been adopted by the majority of states."); Restatement (Second) of Contracts § 208 (1981) (also following U.C.C. § 2-302).

The Legislative Comments to § 1670.5 confirm that it gives courts "discretion" to "refuse to enforce the contract as a whole if it is permeated by the unconscionability, or [to] strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or [to] simply limit unconscionable clauses so as to avoid unconscionable results." California courts thus have the discretion to refuse to enforce the contract as a whole if it is "permeated" by unconscionability.

The California Supreme Court first had occasion to interpret the permeation standard in *Armendariz*. *See* 24 Cal. 4th at 122 ("We could discover no published cases in California that address directly the question of when a trial court abuses its discretion by refusing to enforce an entire agreement, as the trial court did in this case, nor precisely what it means for an agreement to be 'permeated' by unconscionability."). In deciding how lower courts should exercise their discretion to sever unconscionable terms, the California Supreme Court turned to the statutes and case law governing the severability of *illegal* (as opposed to unconscionable) contract terms.[1] *See id.* (citing Cal. Civ. Code §§ 1598 and 1599). The court examined cases involving contracts of various types, including sales contracts, landlord-tenant contracts, attorney fee agreements, and covenants not to compete. *See id.* at 122-24. Six of the eight cases relied on did not touch on arbitration. *Id.* The court also analogized unconscionable contract provisions to unlawfully broad covenants not to compete, which "courts have tended to invalidate rather than restrict." *Id.* at 124 n.13 (citing Farnsworth on Contracts § 5.8, p. 86, n.23 (2d ed. 1988)). The court reasoned that an overly solicitous severance rule would "encourage[ ] employers to overreach," by "routinely inserting a deliberately illegal clause" into contracts, "know[ing]

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[1] Illegal (i.e., "unlawful") terms are those whose very performance would require an illegal act or omission. *See* Cal. Civ. Code §§ 1595, 1599, 1667.

that the worst penalty for such illegality is the severance of the clause after the employee has litigated the matter." *Id.*

From its broad survey of general contract law, the *Armendariz* court identified "basic principles of severability that . appear fully applicable to the doctrine of unconscionability": Severance is inappropriate where "the central purpose of the contract is tainted with illegality," but it is appropriate "[i]f the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction." *Id.* at 124. "The overarching inquiry is whether 'the interests of justice would be furthered' by severance. Moreover, courts must have the *capacity* to cure the unlawful contract through severance or restriction of the offending clause, which is not invariably the case." *Id.* at 123-24 (citations omitted).

Eight years later, the California Supreme Court addressed the severability of a non-arbitration contract. *Marathon Entm't, Inc. v. Blasi*, 42 Cal. 4th 974 (2008), *as modified* (Mar. 12, 2008). Maintaining consistency in the law's approach to illegal and unconscionable terms in all contracts, the court reemphasized that trial courts enjoy substantial discretion: "the full voiding of the parties' contract is available, but not mandatory; likewise, severance is available, but not mandatory." *Id.* at 996. To guide trial courts in exercising that discretion, the *Marathon* court went on to reiterate the basic principles distilled in *Armendariz*. *Id.* The court remanded for the trial court to conduct

a fact-specific severability analysis under those principles. *Id.* at 999.

As applied to unconscionable contract provisions, California's general doctrine of severability can thus be summarized as follows. If (1) the unconscionability does not permeate the contract (in other words, if the unconscionability does not taint the central purpose of the contract but is instead collateral to it) *and* (2) the court has the capacity to cure the contract by severing or restricting the offending clause(s), then severance is appropriate. Whether the unconscionability permeates the contract (that is, taints its central purpose) depends on whether enforcing the remainder would serve the interests of justice. This depends, in turn, on whether such enforcement would prevent undeserved benefit or detriment, and whether it would conserve a contractual relationship without condoning an illegal scheme. *Armendariz*, 24 Cal. 4th at 123-24. Whether a court has the capacity to cure a contract through severance depends on whether severing the offending clause(s) would require it to add terms to the contract, which California courts lack the power to do. *See id.* at 125. If severance would fail to serve the interests of justice *or* require a court to assume the role of contract author, then severance is not appropriate.

In this way, California's severance doctrine derives from statutes and case law that apply to all contracts. It is unsurprising, then, that even though the doctrine happens to have been distilled in a case involving an arbitration agreement (*Armendariz*), it

applies evenhandedly to contracts of all sorts. As discussed below, California courts have applied this standard equitably, finding some non-arbitration contracts unenforceable, and finding some arbitration contracts severable.

B. California Courts Apply the Same Equitable, Discretionary Severance Standard to All Contracts.

Petitioners argue that California applies a more stringent severance standard to arbitration agreements than to other types of contracts. In fact, the standard is the same for all contracts. Petitioners obscure this fact by describing the equitable, discretionary standard derived from § 1670.5 as though it were a categorical rule, and by inviting a mistaken reading of California law.

Armendariz itself illustrates the discretionary nature of the standard established by the Legislature. The court held that the presence of multiple unconscionable provisions in the agreement at issue "*indicate*[*d*] a systematic effort" to achieve an unlawful purpose, *justifying* the trial court's exercise of discretion to not sever. *Armendariz*, 24 Cal. 4th at 124 (emphasis added). The *Armendariz* court did not say that drafting multiple unconscionable provisions *constituted* a systematically unlawful effort or *required* severance. Rather, such overreaching supported the trial court's exercise of discretion.

It is therefore misleading for Petitioners to claim, as they do repeatedly, that *Armendariz* established an "arbitration-only anti-severance rule." Pet. 2, 10, 14, 15, 17, 18. The only "rule" is that courts must exercise their discretion in light of the interests of justice and the curability of the contract, no matter what the contract is about.

1. California's Severance Doctrine Is Not "Arbitration-Only."

The standard is not "arbitration-only," because it applies to contracts of all kinds. California courts have applied the state's severability standard to non-arbitration contracts in a variety of settings. *See, e.g.*, *MKB Mgmt., Inc. v. Melikian*, 184 Cal. App. 4th 796, 805 (2010) (holding that "the doctrine of severability may apply" to a property management agreement, "in the discretion of the trial court"); *Greenlake Capital, LLC v. Bingo Investments, LLC*, 185 Cal. App. 4th 731, 740 (2010) (reversing summary judgment and remanding for equitable consideration of severance issue in connection with financing agreement); *Shopoff & Cavallo LLP v. Hyon*, 167 Cal. App. 4th 1489, 1523 (2008) ("granting recovery under a contingent fee agreement although the charging lien may be invalid is consistent with the law of severability of contracts" when it would avoid an "unfair windfall").

And in so applying this neutral standard to non-arbitration contracts, California courts have sometimes exercised their discretion not to sever, finding

an entire contract unenforceable. *See, e.g.*, *Summit Media LLC v. City of Los Angeles*, 211 Cal. App. 4th 921, 938 (2012) (affirming lower court's refusal to sever unlawful zoning exemption from settlement agreement); *Chiba v. Greenwald*, 156 Cal. App. 4th 71, 81-82 (2007) (upholding lower court's decision not to sever unlawful portions of personal management contract). On the other hand, California courts sometimes exercise their equitable discretion to sever. *See, e.g.*, *Templeton Dev. Corp. v. Superior Court*, 144 Cal. App. 4th 1073, 1084 (2006) (severing faulty mediation provision to avoid conferring "undeserved benefit").

2. California's Severance Doctrine Is Not "Anti-Severance" as Applied to Arbitration Agreements.

Likewise, California's fact-sensitive severance standard is not "anti-severance" as applied to arbitration agreements. Petitioners argue that California courts take a more severance-friendly approach in non-arbitration cases. Pet. 12-16. But the approach Petitioners describe is based on a twofold misunderstanding of California law.

First, California law does not "generally prohibit[ ]" non-severance just because a contract has some lawful purposes, as Petitioners claim. Pet. 12 (citing

Cal. Civ. Code §§ 1599 and 1670.5).[2] The severance of illegal provisions under § 1599, like the severance of unconscionable provisions under § 1670.5, is always discretionary. "[S]everance is not mandatory and its application in an individual case must be informed by equitable considerations. [Section] 1599 grants courts *the power, not the duty*, to sever contracts in order to avoid an inequitable windfall or preserve a contractual relationship where doing so would not condone illegality." *Marathon*, 42 Cal. 4th at 992 (emphasis added) (citation omitted) (citing *Armendariz*, 24 Cal. 4th at 123-24); *see also Chiba*, 156 Cal. App. 4th at 81; *Yoo v. Robi*, 126 Cal. App. 4th 1089, 1105 (2005), *as modified on denial of reh'g* (Mar. 9, 2005). *Armendariz* harmonized the treatment of illegal provisions under § 1599 and unconscionable provisions under § 1670.5(a) by making clear that trial courts have the same guided discretion with respect to both types of defect: the "court may refuse to enforce the contract, or it may enforce the remainder." 24 Cal. 4th at 121.

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[2] Nor did the California Supreme Court hold in *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119, 138 (1998), *as modified* (Feb. 25, 1998), that non-severance is allowed "[o]nly '[i]f the court is unable to distinguish between the lawful and unlawful parts of the agreement,'" as Petitioners assert. Pet. 13 (second alteration in original). By inserting the word "only" before the quotation, Petitioners convert what the *Birbrower* court treated as a *sufficient* condition for discretionary non-severance into a *necessary* condition for it.

Second, contrary to Petitioners' assertion, California law has no rule by which the presence of "more than one unconscionable provision automatically allows a court, without further inquiry, to decline to sever." Pet. 15-16. Rather, California law calls for trial courts assessing severability to weigh the interests of justice and to consider whether they can fairly rid the contract of the taint of unconscionability by excising (or restricting) the unconscionable provisions.[3] That is what the district court did in this case,[4]

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[3] Petitioners' amicus similarly misstates the law: "Under *Armendariz* , if a court finds 'more than one unlawful provision' in an arbitration agreement to be unconscionable, it *will* deny severance and refuse to enforce the agreement in its entirety." Pac. Legal Found. Amicus Br. 2 (emphasis added). That is incorrect. *See also id.* at 2-3 (misstating the facts in claiming that the court of appeals here "[a]ppl[ied] this principle"); *id.* at 3 (describing the court of appeals as having applied "the *Armendariz* severance rule: that a court should refuse to sever unconscionable provisions in an arbitration agreement, whether or not the offensive provisions permeate and infect the entirety of the contract"). Again, the presence of multiple unconscionable provisions is merely an indicator of permeation, not a substitute for a finding thereof.

[4] In describing the district court's conclusion that the five unconscionable provisions supported a finding of permeation, Petitioners suggest misleadingly that the contract's being an arbitration agreement was crucial. Pet. 8 (describing the district court as having held that it is proper to find such support "when the contract at issue is an arbitration agreement"). The fact that the five unconscionable provisions occurred in an *arbitration* agreement was of no moment. Neither *Armendariz* nor the district court here even hinted—much less held—that the presence of multiple unlawful provisions had special significance for arbitration agreements alone.

and that is why the court of appeals was correct to find no abuse of discretion.'

In short, Petitioners' claim that there is a special severance standard for arbitration contracts has no basis in California law. The California Legislature has adopted the Uniform Commercial Code's generally applicable contract principles; the California Supreme Court has interpreted those principles in light of general contract law; and California courts have applied the resulting doctrine equitably. The result is a single discretionary standard for all contracts. This standard gets applied in a variety of contexts. Sometimes severance is the result; sometimes it is not. As the California Supreme Court made clear in the non-arbitration context in *Marathon*,

> Inevitably, no verbal formulation can precisely capture the full contours of the range of cases in which severability properly should be applied, or rejected. The doctrine is equitable and fact specific, and its application is appropriately directed to the sound discretion of the Labor Commissioner and trial courts in the first instance.

42 Cal. 4th at 998.

The standard is discretionary in practice as well as in principle, as is demonstrated by the many California courts that have recently done exactly what Petitioners suggest California law prohibits: sever multiple unconscionable provisions in order to save an arbitration agreement. *See, e.g.*, *Pope v.*

Sonatype, Inc., No. 05 Civ. 0956, 2015 WL 2174033, at *6 (N.D. Cal. May 8, 2015) (three provisions severed); *Grabowski*, 817 F. Supp. 2d at 1178-79 (three provisions severed); *Arreguin v. Global Equity Lending, Inc.*, No. 07 Civ. 6026, 2008 WL 4104340, at *8 (N.D. Cal. Sept. 2, 2008) (two provisions severed); *Bencharsky v. Cottman Transmission Sys., LLC*, 625 F. Supp. 2d 872, 883 (N.D. Cal. 2008) (three provisions severed);[5] *Lucas v. Gund, Inc.*, 450 F. Supp. 2d 1125, 1134 (C.D. Cal. 2006) (two provisions severed); *Bolter v. Superior Court*, 87 Cal. App. 4th 900, 910 (2001) (three provisions severed). Petitioners' amicus cites several such cases as evidence that "[n]ot all federal courts, applying California law, uncritically accept the *Armendariz* no-more-than-one rule." Pac. Legal Found. Amicus Br. 7-8. But what these cases actually show is that *there is no such rule*.[6]

II. The Ninth Circuit's Decision Does Not Conflict with This Court's Precedent.

Contrary to Petitioners' claims, California courts have embraced this Court's decision in *Concepcion*,

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[5] *Bencharsky* was decided by the same district court judge who decided the present case below, Judge Illston. *See* 625 F. Supp. 2d at 874; Pet. App. 30a.

[6] Respondents have not found a case involving as many unconscionable aspects as Petitioners included in their arbitration agreement. Presumably there are contracts with five major components that are unconscionable. But if so, they appear to be quite rare.

taking to heart its clarification of the "limits the FAA places on state unconscionability rules as they pertain to arbitration agreements." *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1143 (2013), *cert. denied*, 134 S. Ct. 2724 (2014) (noting that *Concepcion* "make[s] clear" that facially neutral state law "must not disfavor arbitration *as applied* by imposing procedural requirements that 'interfere[] with fundamental attributes of arbitration'" (second alteration in original) (quoting *Concepcion*, 131 S. Ct. at 1748, 1751)); *see also Sanchez v. Valencia Holding Co., LLC*, No. S199119, 2015 WL 4605381, at *6 (Cal. Aug. 3, 2015). Indeed, the California Supreme Court has held several California laws to be preempted by the FAA in light of *Concepcion*'s guidance. *See Sanchez*, 2015 WL 4605381, at *15 ("[T]he CLRA's anti-waiver provision is preempted insofar as it bars class waivers in arbitration agreements covered by the FAA."); *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 366 (2014), *cert. denied*, 135 S. Ct. 1155 (2015) ("We thus conclude in light of *Concepcion* that the FAA preempts the *Gentry* rule."); *Sonic-Calabasas*, 57 Cal. 4th at 1139 ("[T]he FAA as construed by *Concepcion* preempts *Sonic I*'s rule categorically prohibiting waiver of a Berman hearing in arbitration agreements."). This is hardly the conspiracy to evade the FAA that Petitioners depict.

Petitioners echo Judge Gould's partial dissent below, arguing that California's severance doctrine "should have been preempted" by the FAA because it "has a disproportionate impact on arbitration

agreements." Pet. 16 (internal quotation marks omitted). But they do not say what this last phrase means. One thing it cannot mean is: "affects arbitration agreements at a higher rate than contracts of other types." For on that reading, drafters of arbitration agreements could render *any* provision (no matter how unconscionable) immune to application of neutral contract law analysis simply by including that provision in sufficiently many arbitration agreements. For example, if it became standard practice to add unconscionable provisions to arbitration agreements in bad faith—a form of overreaching that many states aim to deter—perfectly neutral state laws disfavoring the severance of such provisions would come to be preempted by the FAA (that is, unless drafters of other types of contracts kept pace). Should an empirical study reveal that arbitration agreements happen to be likelier than contracts of other kinds to be grossly one-sided, it would immediately follow, on that crude reading of *Concepcion*, that state laws limiting the enforcement of grossly one-sided contracts are preempted by the FAA. Surely that was not Congress's intent. *Cf. Chavarria*, 733 F.3d at 927 (noting that "'disproportionate impact' cannot be read to immunize all arbitration agreements from invalidation no matter how unconscionable they may be, so long as they invoke the shield of arbitration").

Here, the district court heeded its duty to "place arbitration agreements on an equal footing with other contracts." Pet. App. 15a (quoting *Concepcion*, 131

S. Ct. at 1745-46 (reaffirming that the FAA "permits arbitration agreements to be declared unenforceable upon such grounds as exist at law or in equity for the revocation of any contract," including "generally applicable contract defenses, such as fraud, duress, or unconscionability" (quoting 9 U.S.C. § 2) (internal quotation marks omitted))). It applied a generally applicable contract defense precisely as state law requires. The state doctrine governing that defense was drawn from general contract law, for contracts generally. The court of appeals upheld the district court's exercise of discretion under the appropriate standard of review and determined that the governing state doctrine was consistent with the purposes of the FAA. At no point did either court single out arbitration for unfavorable treatment. Their decisions thus comported with this Court's precedent.

III. The Ninth Circuit's Decision Does Not Conflict with Those of Other Courts of Appeals.

Petitioners argue that the ruling below "puts the Ninth Circuit squarely in conflict with at least four other courts of appeals." Pet. 18. This is false both legally and factually.

It is impossible as a matter of law because the court of appeals' decision is an unpublished memorandum disposition, which is "not precedent." Pet. App. 1a; 9th Cir. R. 36-3(a). The panel does not speak for the Ninth Circuit, so its disposition simply cannot put the Ninth Circuit into conflict with other courts of

appeals. To establish a circuit split, Petitioners must therefore point to other, *precedential* Ninth Circuit decisions that are at odds with those of other courts of appeals. And they make no such showing.

But even if the panel's decision were precedential, there would be no conflict. The four decisions cited by Petitioners either disclaim the alleged conflict, lack occasion to address the relevant issue, apply a severance doctrine unlike California's, or recognize a doctrine somewhat like California's without finding it preempted. As if that were not enough, all of these courts confront agreements far less defective than Petitioners' The agreements in these four cases contained zero, one, or two unconscionable provisions; here, Petitioners chose to insert five unconscionable provisions into their agreement.[7] Petitioners cite no evidence that any of these courts would have reached a different result in this case. Where these courts discuss severability at all, the differences Petitioners mislabel as "circuit splits" result not from any discord as to the FAA's requirements, but rather from the

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[7] After this action was filed, Petitioners overhauled their arbitration agreement, abandoning the five unconscionable provisions and two other provisions that Respondents had criticized as unfair. *See* App. 22a-24a. If the severance-at-all-costs rule requested by Petitioners were to become law, Petitioners would have incentive to rework those unconscionable and unfair provisions back into their arbitration agreement, safe in the knowledge that the worst possible result of their overreaching would be severance of the offending provisions.

application of other states' laws to distinguishable facts.

A. The Ninth Circuit Does Not Disagree with the Seventh Circuit as to Whether California May Treat Arbitration Differently.

In *Oblix, Inc. v. Winiecki*, which does not discuss severability at all, the Seventh Circuit itself noted that according to the Ninth Circuit, *Armendariz* does not "establish any special hurdles for arbitration agreements." 374 F.3d 488, 492 (7th Cir. 2004). The *Oblix* court further noted that the Ninth Circuit "would enforce without ado an agreement like the one between Oblix and Winiecki," just as the *Oblix* court did. *Id.* (citing *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003) (en banc)). This is far from what Petitioners call a circuit split "as to whether California may enforce rules that 'treat[] arbitration differently.'" Pet. 18 (alteration in original). If there was a circuit split here, the Seventh Circuit certainly did not notice it.

B. The Ninth Circuit Does Not Disagree with the Sixth, Eighth, or D.C. Circuits as to the Effects of Severability Clauses.

Petitioners do not specify the subject of the second circuit split they allege. They suggest that the Sixth, Eighth, and D.C. Circuits disagree with the Ninth as to whether, under federal law, the presence

of a severability clause in an arbitration agreement requires severance of any invalid or unenforceable provisions in that agreement. *See* Pet. 19. But these circuits set forth no such rule. Moreover, two of them expressly distinguish cases like this one, in which the contract at issue is riddled with unconscionability.

1. The Sixth Circuit in *Morrison* Applied Other States' Severance Doctrines and Gave No Indication That It Would Have Reached a Different Result Here.

Petitioners claim that according to the Sixth Circuit, when an arbitration agreement contains a severability clause, "[the] intent of the parties and [federal] policy in favor of arbitration dictate that the remainder of the agreement be enforced." Pet. 20 (alterations in original) (quoting *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003)) (internal quotation mark omitted). But this "dictate" came from the particular state laws applied in that case, which, unlike California law, made contract severability depend primarily on the intent of the parties. *See Morrison*, 317 F.3d at 675, 677 n.21 (discussing the Ohio and Tennessee severance doctrines that governed the two agreements at issue). The court recognized that "a particular provision of an arbitration agreement" could "taint[ ] the entire agreement." *Id.* at 675. It simply held that under state laws making the parties' intent paramount, courts should not "lightly conclude" that such tainting has occurred in

the presence of a severability clause. *Id.* Faced with two agreements containing only one and two unenforceable provisions, respectively, see *id.* at 674, 677, the *Morrison* court elected to sever. Nothing in its decision suggests that the FAA is incompatible with California's contract doctrine, which also eschews a bright line rule in favor of giving trial courts discretion to reach the right result based on the facts at hand. Thus, *Morrison* did not assert that severability clauses always mandate severance under the FAA. And Petitioners cite no evidence that the Sixth Circuit would have reached a different result than the court of appeals in the present case, where (not just one or two but) five provisions were unconscionable.

2. The Eighth Circuit in *Gannon* Faced Only One Defective Provision and Recognized the Validity of a State Doctrine Like California's.

In *Gannon v. Circuit City Stores, Inc.*, only one provision of the contract was unenforceable under Missouri law. 262 F.3d 677, 679 (8th Cir. 2001). "[R]ecogniz[ing] that in certain situations one party may include so many invalid provisions that the validity of the entire agreement would be undermined," the court found the lone unenforceable provision insufficient to meet that hurdle. *Id.* at 681 (acknowledging that non-severance is appropriate "where there is some 'all-pervading vice, such as fraud, or some unlawful act which is condemned by

public policy or the common law and avoids all parts of the transaction because all are alike infected'"). Thus, the *Gannon* court joins the Ninth Circuit in recognizing that courts can, consistent with the FAA, exercise discretion to refuse to sever when there is too much overreaching by the drafter.[8] Here, too, Petitioners fail to establish a split.

3. The D.C. Circuit in *Booker* Faced Only One Defective Provision and Cast Doubt on the Existence of a Circuit Split Over Severance.

Booker v. Robert Half International, Inc. also involved an arbitration agreement with only one unenforceable provision. 413 F.3d 77, 85 (D.C. Cir. 2005). The *Booker* court discussed concerns about overreaching. Specifically, the court explained that trial courts have discretion under District of Columbia law to sever unenforceable provisions or find an entire arbitration agreement unenforceable, depending on the circumstances: "the more the employer overreaches, the less likely a court will be able to sever the provisions and enforce the clause, a dynamic that

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[8] Contrary to Petitioners' assertion, *Gannon* does not say that non-severance in the face of a severability clause "represent[s] the antithesis of the 'liberal federal policy favoring arbitration agreements.'" Pet. 21 (quoting *Gannon*, 262 F.3d at 682). What *Gannon* actually says is that such an antithesis would result "if we were to hold entire arbitration agreements unenforceable *every time a particular term is held invalid*." *Gannon*, 262 F.3d at 682 (emphasis added).

creates incentives against the very overreaching Booker fears." *Id.* at 85. The court's discretion turns, as it does under California and many other states' laws, on the degree to which "illegality pervades the arbitration agreement." *Id.* at 84 (citing *Graham Oil*, 43 F.3d at 1248-49); *id.* at 85 ("We do not question that there may be cases where a forbidden provision is so basic to the whole scheme of a contract and so interwoven with all its terms that it must stand or fall as an entirety." (quoting *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 78 (1953))).

The *Booker* court also noted differing severance outcomes in various circuits. But the court cautioned that "[t]he differing results may well reflect not so much a split among the circuits as variety among" the arbitration agreements involved. *Id.* at 84. "Decisions striking an arbitration clause entirely often involved agreements without a severability clause or agreements that did not contain merely one readily severable illegal provision, but were instead pervasively infected with illegality [citing Ninth Circuit precedent]. Decisions severing an illegal provision and compelling arbitration typically considered agreements with a severability clause and discrete unenforceable provisions." *Id.* (citing *Morrison*, 317 F.3d at 675, and *Gannon*, 262 F.3d at 680). The court also noted that unlike the arbitration agreement held unenforceable by the Ninth Circuit in *Graham Oil*, 43 F.3d 1244, Booker's agreement showed no evidence of "an integrated scheme to contravene public policy." *Booker*, 413 F.3d at 85.

In short, *Booker* explicitly recognized that courts can properly refuse to enforce arbitration agreements when they are sufficiently infected by unenforceable provisions. In that particular case, the court simply found that "[t]his one unenforceable provision does not infect the arbitration clause as a whole," finding that particular lone unconscionable provision "more readily severable" than others. *Id.* In other words, the court suggested not that a permeation-like standard was preempted, but only that Booker's agreement was not permeated. Like the other three cases cited by Petitioners, *Booker* is consistent with the Ninth Circuit's decision as to any FAA-mandated effects of severability clauses.

IV. This Case Is a Poor Vehicle for Review.

Now is not an opportune time for this Court to take up the issue presented here, because California law may be in flux on related matters. Over the past three years, the California Supreme Court has granted petitions to review and superseded several unconscionability opinions, deferring further action pending consideration and disposition of related issues in *Sanchez v. Valencia Holding Co., LLC*, 135 Cal. Rptr. 3d 19 (Cal. Ct. App. 2011), *review granted and opinion superseded*, 272 P.3d 976 (Cal. 2012). In *Sanchez*, a California court of appeal refused to enforce an arbitration agreement, finding that four provisions permeated it with unconscionability and that the unconscionability was incurable. *See id.* at 40-41. The California Supreme Court reversed on August 3,

2015 and has yet to dispose of the pending cases. *See Sanchez*, 2015 WL 4605381, at *9-15 (holding that none of the provisions were substantively unconscionable and that the FAA preempts a state anti-waiver law "insofar as [it] bars class waivers in arbitration agreements covered by the FAA").

Many of the cases deferred pending *Sanchez* address the severability of unconscionable provisions in arbitration agreements. *See Trabert v. Consumer Portfolio Servs., Inc.*, 184 Cal. Rptr. 3d 596, 607 (Cal. Ct. App. 2015) (severing two unconscionable provisions), *review granted and opinion superseded*, 349 P.3d 1067 (Cal. 2015); *Vargas v. Sai Monrovia B, Inc.*, 157 Cal. Rptr. 3d 742, 766-67 (Cal. Ct. App. 2013) (declining to sever four provisions), *review granted and opinion superseded*, 304 P.3d 1082 (Cal. 2013); *Natalini v. Imp. Motors, Inc.*, 153 Cal. Rptr. 3d 224, 234 (Cal. Ct. App. 2013) (affirming refusal to sever three provisions), *as modified* (Feb. 5, 2013), *review granted and opinion superseded*, 299 P.3d 700 (Cal. 2013); *Goodridge v. KDF Auto. Grp., Inc.*, 147 Cal. Rptr. 3d 16, 32 (Cal. Ct. App. 2012) (affirming refusal to sever four provisions), *review granted and opinion superseded*, 290 P.3d 1116 (Cal. 2012); *Mayers v. Volt Mgmt. Corp.*, 137 Cal. Rptr. 3d 657, 670 (Cal. Ct. App. 2012) (affirming refusal to sever two provisions), *as modified on denial of reh'g* (Feb. 27, 2012), *review granted and opinion superseded*, 278 P.3d 1167 (Cal. 2012).

The significance of any impact that California's severance doctrine may have on the FAA's objectives

depends, in the first instance, on the scope of the state's unconscionability doctrine. Given the recent development concerning that scope, the number of severability decisions that stand to be reconsidered in light of it, Petitioners' flawed presentation of the issues in this case, and the lack of any circuit split over them, this Court would do better to let *Sanchez*'s effects take shape before deciding whether the issue presented here merits review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST 2015

APPENDIX

PROVIDER SERVICES CTO AGREEMENT

This Agreement is made by and between the provider named on the signature page of this Agreement ("Provider") and MHN Government Services, Inc., (hereinafter referred to as "MHN"). The effective date of this Agreement is set forth on its signature page.

Recitals:

WHEREAS, the Provider has the legal authority to enter into this Agreement and to deliver or arrange for the delivery of short term, situational, problem solving non-medical counseling support services; and

WHEREAS, the Provider maintains a duly licensed, private counseling practice, either as an individual or within a group practice or has retired from said practice; and

WHEREAS, the Provider desires to supplement (but not replace) his income from his private or group practice, employment, contracted work, other sources, or retirement by contracting to provide Services under this Agreement; and

WHEREAS, MHN desires to contract with the Provider to provide counseling services that constitute Services under this Agreement.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and promises contained

herein, and intending to be bound hereby, the parties agree as follows:

1. **Provider Services.**

   (a) **Services.** In the event that Provider accepts a placement under a Consultant Task Order ("CTO") during the term of this Agreement, Provider shall deliver or arrange the short term, situational, problem-solving non-medical counseling services set forth in and subject to any additional terms in the CTO attached hereto or issued in the future and made a part of this Agreement (the "Services").

   (b) **No Additional Work Obligation.** Provider agrees that MHN is not obligated to make new placements or issue any additional CTOs for work by Provider under this Agreement.

   (c) **Aggregate Placement Time Limit.** The aggregate amount of time for all placements under this Agreement shall not exceed 180 days in any continuous 12 month period during the Term of this Agreement.

   (d) **Professional Liability Insurance.** Provider shall maintain professional liability insurance at Provider's own expense in the amount of one million dollars ($1,000,000) per claim and one million dollars ($1,000,000) in the aggregate of all claims per policy year. Provider agrees to provide MHN with written evidence, acceptable to MHN, of such insurance coverage in accordance with MHN's

credentialing and recredentialing requirements and naming MHN, and the U.S. federal government, as additional insureds. Provider also agrees to notify, or to ensure that its insurance carriers notify, MHN at least thirty (30) days prior to any proposed termination, cancellation or material modification of any policy for all or any portion of the coverage required herein. Notwithstanding any insurance coverages of Provider, nothing in Section 1.(d) shall be deemed to limit or nullify Provider's indemnification obligations under this Agreement. Provider agrees to waive any rights of subrogation that Provider may have against MHN, or the U.S. federal government under applicable insurance policies related to the work performed by Provider. Indemnification by Provider shall not be limited or reduced by any insurance coverage limitations. Provider shall make certain that any and all subcontractors or employees of Provider are insured in accordance with this Agreement. If any subcontractor's coverage does not comply with the provisions herein, Provider shall indemnify and hold MHN harmless of and from any damage, loss, cost or expense, including attorneys' fees, incurred by MHN as a result thereof.

(e) **No or Limited Liability of MHN and Other Insurance Coverage.** To the extent required by federal laws applicable to government contracts, such as the Defense Base Act, MHN may maintain certain insurance coverage the benefit of which may extend to

Provider. MHN's liability to Provider or any third party is limited to the extent of such coverage. As such, Provider acknowledges that there may be a need for Provider, at Provider's discretion, to further obtain and maintain other insurance policies as MHN or Provider may reasonably deem necessary, including without limitation medical, disability, worker's compensation, and rescue/evacuation insurance in the event of medical emergency or death. In the event that Provider is a group practice that employs or subcontracts with other providers who provide Services hereunder, Provider shall maintain such policies of general liability and workers compensation as may be required by applicable law or as is reasonable and customary for such groups. In the instance where no insurance coverage is maintained by MHN the benefit of which may extend to Provider, MHN shall have no liability to Provider or any third party including acts of negligence on the part of provider or damage or theft of Provider's personal property. Nothing contained herein shall be interpreted or construed to require that MHN have any such insurance coverage, or if it has it, to continue to retain it or otherwise prevent MHN from modifying or eliminating such coverage in the future. Further, MHN shall have no obligation to provide insurance to Provider, or, if it maintains insurance that does cover Provider, from making any changes or otherwise terminating such coverage as it may pertain to Provider.

(f) **Credentialing.** Provider shall comply with MHN's credentialing and recredentialing requirements.

(g) **Professional Provider.** If Provider is a group practice, Professional Providers are the health care providers who contract with Provider, or are employed by Provider, and who have been credentialed and accepted by MHN to provide the Services described herein. Professional Providers accepted by MHN are limited to the Professional Providers named in the CTOs. Furthermore, Provider has the unqualified authority to and hereby binds itself, and any Professional Providers covered by this Agreement (referred to herein collectively as "Provider"), to the terms and conditions of this Agreement and the CTOs referenced herein.

(h) **Military and Family Life Consultant (MFLC) Provider Guidelines.** The MFLC Provider Guidelines issued by MHN, as updated from time to time, is incorporated into this Agreement by this reference and available on MHN's website or on hardcopy upon request. Provider agrees to be contractually bound to comply with the MFLC Provider Guidelines and any updates or revisions to such, which are effective as of the date of each respective CTO accepted hereunder. In the event that any provision in the MFLC Provider Guidelines or any updates thereto are clearly inconsistent with the terms of this Agreement, the terms of this Agreement, including any amendments, shall prevail.

2. CTOs.

(a) MHN, solely at its discretion, may issue CTOs under this Agreement to the Provider calling for the provision of the Services. The CTO will include the following minimum information:

2.a.1 CTO Number and MHN's Contract/ Subcontract Number.

2.a.2 Description of ordered Services.

2.a.3 Placement location.

2.a.4 Period of performance.

2.a.5 Invoicing and Payment Terms.

2.a.6 Rate of payment for the services, applicable Non-Labor expenses, and Ceiling Price.

2.a.7 Professional Provider(s) approved for placement.

2.a.8 Appendix A specifying the terms and conditions for the placement(s) covered by the CTO.

(b) Prior to the issuance of a CTO, MHN shall advise the Provider of the details of required performance (as depicted in 2.a.2 thru 2.a.4 above. Provider shall detail the name(s) of the Professional Providers(s) that Provider proposes to use to conduct the services. All Professional Providers named by Provider must be credentialed and approved by MHN.

Provider shall not substitute named Professional Providers without the express written authorization of MHN.

(c) MHN will issue the CTO to the Provider and shall name the Professional Provider agreed upon. Upon receipt of the CTO, Provider agrees to notify MHN within two (2) business days via email of the Provider's decision to "decline" the CTO. If MHN does not receive such a written declination within two (2) business days, this shall constitute Provider's acceptance of the CTO and Provider's agreement to performance thereunder.

(d) **Payment.** Subject to Section 3 of this Agreement, during the term of this Agreement, for Services provided in each placement, MHN shall pay to Provider as compensation for the Services provided the Payment specified in the CTO issued hereunder that describes the placement.

3. **Invoicing and Payment.**

(a) **Services.** MHN shall pay to Provider as full compensation for the Services provided under any resulting CTO, the Rate of Payment stated in such CTO for such services. MHN, however, may pay for partial delivery of services, through a progress payment, based upon Provider's submission of a properly prepared invoice, as stated below. In addition,

(b) **Invoice Submissions.** Provider shall submit invoices for services ("Invoices") in accordance with the terms and conditions set forth in the CTO and MFLC Provider Guidelines. Consistent submission of timely Invoices is a condition of continued participation under this Agreement.

(c) **Timely Filing of Invoices.** Payment under this Agreement and any placement hereunder shall be conditioned upon Provider submitting complete, timely and accurate Invoices, in accordance with the submission requirements hereunder. Provider expressly acknowledges its understanding and agreement, that Invoices must be submitted within thirty (30) calendar days from the date the expense was incurred or the services were provided, in order to be considered timely submitted and payable by MHN. Notwithstanding the foregoing, in the event that MHN denies an invoice submitted after the 30-day deadline on the basis that it was not submitted timely, upon demonstration by Provider of good cause for the delay through the provider dispute resolution process specified in the MFLC Provider Guidelines, MHN will reprocess the invoice as if it were timely.

(d) **Form W-9.** Payment under this Agreement and any placement hereunder shall be conditioned upon Provider submitting a completed and signed "Form W-9," Taxpayer Identification Number Request, as set forth in the MFLC Provider Guidelines.

(e) **Right of Set-off.** In relation to any collection and payment of monies owed by Provider to MHN, MHN shall have the right, after the 45th calendar day following MHN's submission of the reimbursement request to Provider or after Provider's appeal rights have been exhausted, to set-off any payments owed to Provider against any funds owing by Provider to MHN, provided that MHN submits to Provider an explanation in writing in sufficient details so that Provider can reconcile each invoice.

4. **Term and Termination of Agreement.**

(a) **Effective Date.** This Agreement shall become effective as of the date set forth on the signature page and shall remain in full force and effect, unless otherwise terminated as provided herein.

(b) **Termination of Agreement for Default.** Either party may terminate this Agreement upon fourteen (14) calendar days prior written notice to the other party if the party to whom such notice is given is in material breach of this Agreement and/or such CTO. The party claiming the right to terminate hereunder shall set forth in the notice of intended termination the facts underlying its claims that the other party is in material breach of this Agreement and/or such CTO. Remedy of such breach to the satisfaction of the party giving notice of intended termination within fourteen (14) calendar days of receipt of such notice shall revive the

Agreement and/or such CTO. Services to be performed during the cure period shall be as required in a written amendment to this Agreement or the applicable CTO.

(c) **Immediate Termination of Agreement or CTO.** This Agreement and/or a CTO shall immediately terminate upon notice to the effected party in the event of the occurrence of any of the following:

4.c.1 Either party's violation of law or regulation pertinent to this Agreement and/or such CTO, upon notice of said violation;

4.c.2 any act, conduct or circumstance which creates any cause for the revocation or termination suspension or other impairment of Provider's license, certifications or accreditation, to provide Services or causes Provider's ability to provide Services in accordance with this Agreement and/or such CTO to be materially impaired;

4.c.3 any misrepresentation or fraud by either party;

4.c.4 Provider's failure to adhere to MHN's credentialing requirements as determined by the MHN Credentialing Committee or failure to maintain professional liability insurance in accordance with this Agreement;

4.c.5 MHN's determination that the health, safety or welfare of any participant

may be in jeopardy if this Agreement and/or such CTO is not terminated;

4.c.6 MHN's determination in its sole discretion that Provider is not able to perform according to the standards of MHN and the Department of Defense; or

4.c.7 Provider is involuntarily terminated from the MHN commercial network; or

4.c.8 The Department of Defense's termination or failure to renew/extend the MHN contract and/or placement under a CTO, or the Department of Defense's request that Provider's placement under a CTO be terminated.

4.c.9 Any act or conduct by the Provider which results in any violation of applicable U.S., or state law or regulations, or the law of any country where the Provider is providing services, including, but not limited to the U.S. Foreign Corrupt Practices Act, Export Administration Act, Foreign Asset Control Act and regulations, Arms Export Control Act and regulations, or any breach of any covenant condition or representation and warranty contained herein.

(d) **Limited Termination Remedy.** In the event that MHN terminates pursuant to Sections 4.c.6 or 4.c.8 any CTO 30 days or greater in length with less than five days prior to

the Placement Start Date, MHN agrees to pay Provider the equivalent of one week's pay based on the Payment Rate and estimated number of hours per week specified in the applicable CTO. In the event that MHN terminates a CTO pursuant to Sections 4.c.6 or 4.c.8 following the start date, then MHN shall pay the provider for the remaining balance of the term of the placement or for one week, whichever is less, under the CTO at the rates specified in the CTO. Provider agrees that it shall have no additional remedy or damages applicable to such termination.

5. **Confidential and Proprietary Information.**

(a) **Department of Defense Premises.** Provider is hereby expressly prohibited from entering area(s) other than the work area(s) designated by the Government or the Provider's military service point of contact, as applicable. Any failure to adhere to this requirement shall constitute a material breach of this Agreement by the Provider.

(b) **Confidentiality Provisions.** The parties hereby agree to hold all confidential or proprietary information or trade secrets of each other in trust and confidence and agree that such information shall be used only for the purposes contemplated herein, and shall not be used for any other purpose. Moreover, it is understood that Provider and MHN shall release patient-related behavioral health information and records that contain individual

identifying information and Provider-specific information only in accordance with applicable state and federal laws. Provider also shall keep strictly confidential all compensation arrangements set forth in this Agreement and its addenda. Provider further acknowledges that medical and financial information of individuals counseled by or eligible for counseling by Provider under this Agreement, shall be deemed confidential, and shall not be disclosed or removed from Department of Defense facilities without the express prior written consent of MHN or as required by applicable Federal laws or regulations. Provider agrees to safeguard Beneficiary privacy and confidentiality as required by applicable law, including, but not limited to the United States Department of Health and Human Services Standards for Privacy of Individually Identifiable Health Information promulgated pursuant to the administrative simplification provisions of the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), as set forth in 45 C.F.R. Subtitle A, Subchapter 3, Parts 160 and 164.

(c) **No Customer Contact.** Provider, as an independent contractor, acknowledges that it is not authorized to represent MHN or to communicate with the Department of Defense on behalf of MHN. Accordingly, Provider agrees that under no circumstances shall Provider contact the Department of Defense, without the express prior written consent of MHN.

(d) Provider understands that any information obtained by Provider from a victim of domestic abuse is protected by the Privacy Act of 1974 and any unauthorized disclosures of client information may result in the imposition of possible criminal penalties.

(e) Provider shall maintain, transmit, retain in strictest confidence, and prevent the unauthorized duplication, use, and disclosure of client and beneficiary information.

(f) Provider shall follow appropriate administrative and physical safeguards to ensure the security and confidentiality of client records and to protect against any anticipated threats or hazards to their security or integrity that could result in substantial harm, embarrassment, inconvenience, or unfairness to the client.

(g) Provider agrees to protect the confidentiality of Government records, client or otherwise, which are not public information.

(h) Information made available to Provider by MHN for the performance or administration of this effort shall be used only for those purposes and shall not be used in any other way without the written agreement of MHN.

(i) If public information is provided to Provider for use in performance or administration of this effort, except with the written permission of MHN, Provider may not use such information for any other purpose. If Provider is uncertain about the availability or proposed

use of information provided for the performance or administration, Provider shall consult with MHN regarding use of that information for other purposes.

(j) Provider agrees to protect the confidentiality of Government records that are not public information.

(k) Performance of this effort may require Provider to access and use data and information proprietary to a Government agency or Government contractor which is of such a nature that its dissemination or use, other than in performance of this effort, would be adverse to the interests of the Government and/or others.

(l) Provider shall not divulge or release data or information developed or obtained in performance of this effort, until made public by the Government, except to authorized Government personnel or upon written approval of MHN. Provider shall not use, disclose, or reproduce proprietary data that bears a restrictive legend, other than as required in the performance of this effort. Nothing herein shall preclude the use of any data independently acquired by Provider without such limitations or prohibit an agreement at not [sic] cost to the Government between Provider and the data owner that provides for greater rights to Provider.

(m) All data received, processed, evaluated, loaded, and/or created as a result of this Agreement or resulting CTOs, shall remain the

sole property of MHN or the Government unless specific exception is granted by MHN, or the Contracting Officer directly through MHN.

(n) This Section 5 shall survive the termination of this Agreement for any reason.

(o) Failure to comply with the requirements of this Section 5 shall constitute a material breach of this Agreement.

6. **Warranties.**

(a) Provider represents and warrants that it has the full right and authority to execute and deliver this Agreement and to perform its obligations under this Agreement, and that neither the execution nor delivery of this Agreement by Provider nor consummation of the transactions contemplated hereby will result in a breach or default under the terms and conditions of any contract, CTO, license, charter document or other agreement by which Provider is bound.

(b) Provider represents and warrants that the Services provided under this Agreement or any CTO will be performed in a professional and workman-like manner by qualified personnel, and that Provider is appropriately credentialed to provide the Services.

(c) Provider represents and warrants that to the best of Provider's knowledge, there exists no actual or potential conflict between Provider's family, business, or financial interest and performance of the Services under this

Agreement, and in the event of change in either Provider's private interest or Services under this Agreement, Provider will raise with MHN any question regarding possible conflicts of interest which may arise as a result of such change. Treatment of TRICARE beneficiaries in the Provider's private practice does not constitute a conflict of interest.

(d) Provider represents and warrants that each person providing Services under this Agreement is physically fit and in good physical condition and has been screened to identify any medical conditions that might limit his or her ability to perform Services in the location(s) where Services must be performed. It is the responsibility of Provider's medical examiner to use sound medical judgment to determine fitness of each person to provide Services.

If any medical condition is identified that may limit his or her ability to perform Services, but which condition is not considered disqualifying by Provider's physician, the Provider shall obtain from the examining physician, in writing, a statement of the reasons why the finding is not likely to limit performance or cause undue risk to the Provider or others in the performance of Services.

(e) Provider represents and warrants that each Provider and Provider's physician has reviewed the required and recommended vaccinations, which requirements and recommendations

are issued by the United States Department of State, the Centers for Disease Control and Prevention, and/or other similar agency/ resource for each location where Services are to be performed, and that each Provider has received such required and recommended vaccinations in a timely manner prior to being deployed to or performing any Services in such location.

(f) Provider represents and warrants that each person providing Services under this Agreement has not and will not violate the any law or regulation of the United States or any state, including, but not limited to the Foreign Corrupt Practices Act, Export Administration Act, Foreign Asset Control Act and regulations, Arms Export Control Act and regulations or any law of any country where the Provider is providing Services.

(g) Provider represents and warrants that each person providing Services under this Agreement has reviewed the travel warnings and security advice as issued by the United States Department of State or other similar agencies and understands the reported risks of each location where Services will be performed.

(h) Provider represents and warrants that the information contained in Appendix XXX (Small Business Certification) is true and correct as of the date of this Agreement and that Provider shall, at least annually during

the term hereof, advise MHN of any changes to the facts set forth therein.

7. **Indemnification by Provider.** Provider shall indemnify MHN, its directors, officers, agents, and employees from and against any and all liabilities, suits, claims, losses, damages, costs, attorneys' fees, and expenses whatsoever arising from any breach of a representation or warranty hereunder or any act or omission of Provider, its agents, or employees during the performance of any of its obligations under this Agreement. Upon request of and at no expense to MHN, Provider shall defend any suit asserting a claim for any loss, damage or liability specified above, and Provider shall pay any such costs incurred in enforcing the indemnity granted above; provided that Provider shall not enter into a settlement of any such suit or claim without the prior written consent of MHN. Provider and its employees shall comply with all applicable laws, ordinance(s), codes and regulations; and Provider hereby indemnifies and agrees to hold MHN harmless from and against all liabilities and penalties imposed or failure to do so.

8. **Relationship of Parties.** MHN and Provider are independent contractors in relation to one another and no joint venture, partnership, employment, agency or other relationship is created by this Agreement. Neither MHN nor Provider is authorized to represent the other for any purposes. Neither of the parties hereto, nor any of their respective officers, agents or employees shall be construed to be the officer, agent or employee of the other party.

9. **Headings.** The section and paragraph headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

10. **Assignment.** Provider shall not assign, sell or transfer this Agreement or any interest therein without the prior written consent of MHN, and any unauthorized assignment or transfer of this Agreement or any interest therein shall be null and void. MHN reserves the right to assign this Agreement or any CTO to any present or future affiliate, subsidiary or parent corporation. MHN Government Services is an affiliate of Managed Health Network, Inc, and MHN at its sole discretion may assign this Agreement to Managed Health Network, Inc. Subject to the provisions of this Section 10, this Agreement shall inure to the benefit of and be binding upon the respective successors and assigns, of any of the parties hereto. Provider shall not assign this Agreement without the prior written authorization of MHN; such authorization shall not be unreasonably withheld.

11. **Waiver.** Waiver of a breach of any provision of this Agreement shall not be deemed a waiver of any other breach of the same or different provision.

12. **Severability.** In the event that any provision of this Agreement is rendered invalid or unenforceable by any valid law or regulation of the State of California or of the United States, or declared void by any tribunal of competent jurisdiction,

the remaining provisions of this Agreement shall remain in full force and effect.

13. **Modification.** This Agreement or any part or section of it can be amended only by mutual written consent of the parties.

14. **Notices.** Any notice required or desired to be given under this Agreement shall be in writing. Notices shall be deemed given five (5) days post deposit in the U.S. mail, postage prepaid. If sent by hand delivery, overnight courier, or facsimile, notices shall be deemed given upon documentation of receipt. All notices to the Provider shall be addressed to the applicable address appearing on the signature page of the Agreement. The addresses to which notices are to be sent may be changed by written notice given in accordance with this Section. All notices to MHN shall be as follows: _____

MHN Services
Professional Relations Department
P.O. Box 10086
San Rafael, CA 94912
Fax: (866) 689-0605
Attn: Vice President Professional Relations

15. **No Third Party Beneficiary.** Nothing in this Agreement, express or implied, is intended or shall be construed to confer upon any person, firm, or corporation other than the parties hereto and their respective successors or assigns, any remedy or claim under or by reason of this Agreement or any term, covenant, or condition hereof, as third party beneficiaries or otherwise, and all of the terms, covenants, and conditions

hereof shall be for the sole and exclusive benefit of the parties hereto and their successors and assigns.

16. **Compliance with Applicable Laws.** Provider and its employees shall comply with all applicable laws, regulations, ordinances and codes, including the procurement of permits and licenses when required, in the performance of this Agreement. Provider shall hold harmless and indemnify MHN against any loss, damage, penalties or liabilities that may occur by reason of Provider's failure to comply with such laws, regulations and codes.

17. **Survival.** The provisions contained in this Agreement that by their nature and context are intended to survive the completion and performance, cancellation or termination of this Agreement or any CTO hereunder, shall so survive.

18. **Governing Law.** This Agreement shall be governed by and construed according to the laws of the State of the Provider's residence, as last set forth in the Provider's credentialing application on file with MHN.

19. **Mandatory Arbitration. YOU SHOULD READ THE PROVISIONS OF THIS MANDATORY ARBITRATION CLAUSE CAREFULLY.** Arbitration replaces the right to go to court, including the right to a jury and the right to participate in a class action or similar proceeding, except as expressly discussed below. The parties agree that any existing or future controversy or claim between them whether the controversy

involves a claim in tort, contract or otherwise (collectively, "Covered Claims"), shall be settled by final and binding arbitration in accordance with the provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 et seq. This includes any dispute relating to the enforceability of this Agreement including, but not limited to any claim that all or part of this Agreement is void or voidable. This Mandatory Arbitration clause is the full and complete agreement relating to the formal resolution of disputes involving Covered Claims. The parties waive their right to a jury or court trial. The parties agree not to arbitrate any dispute between them on a class, collective or representative basis. In other words, all disputes will be resolved on an individual basis. The Arbitrator will not have the authority to hear claims on a collective, representative or class basis. The complaining party must serve a written demand for arbitration upon the other party to initiate these arbitration proceedings. The written demand shall contain a detailed statement of the matter and facts supporting the demand and include copies of all related documents. Arbitrations will be administered by the American Arbitration Association ("AAA") under the AAA's Commercial Arbitration Rules and Mediation Procedures, which are available for your review online at the AAA's website, www.adr.org. These rules are subject to modifications from time to time and the parties are responsible for reviewing the rules periodically. A single, neutral arbitrator who is licensed to practice law will be selected in a manner consistent with AAA's Rules. Upon notice of a demand, the parties will

agree upon an arbitrator or, if unable to agree, will follow the arbitrator selection process provided for by the AAA. Location of the arbitration proceeding shall be determined in a manner consistent with AAA's rules. The Arbitrator may, in his or her discretion, permit the parties to use discovery procedures that the arbitrator deems appropriate. Each party bears the responsibility of their attorney's fees, unless otherwise provided for by an award of the Arbitrator. However, the Arbitrator shall not have authority to award attorneys' fees or costs unless a statute expressly authorizes the award of attorneys' fees and costs. Any party presenting a witness will be responsible for paying that witness's fees and expenses. The cost of any evidence or proof produced at the Arbitrator's direction will generally be borne by the party producing that evidence or proof. Judgment upon the award rendered by the arbitrator may be entered in any court having competent jurisdiction. The decision of the arbitrator shall be final and binding. The arbitrator shall make findings of fact and conclusions of law and shall have no authority to make any award that could not have been made by a court of law. In the event any portion of this Mandatory Arbitration clause is deemed invalid, void or unenforceable, the remainder of this Mandatory Arbitration clause will be valid and enforceable.

20. **Entire Agreement.** This Agreement, inclusive of any CTOs that may be issued hereunder, constitutes the entire Agreement of the parties with respect to the subject matter hereof. No promises, terms, conditions, or obligations other than those contained herein shall be valid or binding. Any

prior agreements, statements, promises, either oral or written, made by any party or agent of any party that are not contained in this Agreement are of no force or effect.

21. **No Press or Public Contact.** Provider will not speak with the press or make any other public statement, press release or other announcement relating to the terms of or existence of this Agreement without the prior written approval of MHN, which approval may be withheld in MHN' sole discretion.

22. **Federal Acquisition Regulations (FAR).** Task Orders resulting from this Agreement shall constitute subcontracts issued under a U.S. federal government contract. All issued Task Orders are subject to the following requirements, as applicable, which are hereby incorporated by reference with the same force and effect as if set forth herein in full text. The full text of these clauses is available at: http://farsite.hill.af.mil/vffara.htm. "Subcontract" as used below denotes "Task Order"

    (a) 52.219-8, Utilization of Small Business Concerns (Dec 2010) (15 U.S.C. 637(d)(2) and (3)) [Applicable if the subcontract exceeds $150,000].

    (b) 52.222-26, Equal Opportunity (Mar 2007) (E.O. 11246). [Applicable if the value a single subcontract, or the combination of all Federally funded subcontracts in last 12 months, total $10,000 or more].

(c) 52.222-35, Equal Opportunity for Veterans (Sep 2010) (38 U.S.C. 4212(a)) [Applicable if Expected Subcontract Value is $25,000 or more].

(d) 52.222-36, Affirmative Action for Workers with Disabilities (Oct 2010) (29 U.S.C. 793) [Applies if subcontract is expected to exceed $15,000]

(e) 52.222-40, Notification of Employee Rights Under the National Labor Relations Act (Dec 2010) (E.O. 13496), if flow down is required in accordance with paragraph (f) of FAR clause 52.222-40. [Applicable if the subcontract exceeds $10,000 and is performed wholly or partially in the United States].

(f) 52.222-50, Combating Trafficking in Persons (Feb 2009) (22 U.S.C. 7104(g)).

(g) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (Feb 2006) (46 U.S.C. App. 1241 and 10 U.S.C. 2631), if flow down is required in accordance with paragraph (d) of FAR clause 52.247-64.

(h) 52.203-13, Contractor Code of Business Ethics and Conduct (Apr 2010) (Pub. L. 110-252, Title VI, Chapter 1 (41 U.S.C. 251 note)), if the subcontract exceeds $5,000,000 and has a performance period of more than 120 days. In altering this clause to identify the appropriate parties, all disclosures of violation of the civil False Claims Act or of Federal criminal law shall be directed to the agency

Office of the Inspector General, with a copy to the Contracting Officer.

(i) 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (Jun 2010) (Section 1553 of Pub. L. 111-5), if the subcontract is funded under the Recovery Act.

(Signatures following on next page)

In witness whereof, the parties have caused this Agreement to be executed by their respective duly authorized representatives as of the effective date below.

EFFECTIVE DATE. This agreement is effective on _____

[To be entered by MHN Government Services, Inc.]

This agreement is not effective until the effective date entered by MHN Government Services, Inc. above.

IN WITNESS WHEREOF, the parties hereto have entered into this agreement on the effective date specified.

PROVIDER NAME:	**MHN GOVERNMENT SERVICES, INC.**
_____ (Legal name/business name that matches Tax ID# or SSN below)	
_____ Address	P.O. Box 10086
_____	San Rafael, CA 94912
TEL: ( ) _____	
FAX: ( ) _____	FAX: (866) 689-0605
By: _____ (Authorized Signature)	By: /s/ John L. Roberts (Authorized Signature)
Name: _____ (Print Name)	Name: John L. Roberts
Title: _____	Title: Manager Health Net Government & Specialty Services
Date: _____	Date: _____

Federal Tax ID# or SSN: _____
(This is the number to which MHN will pay for services)

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 14-1458

IN THE

Supreme Court of the United States

MHN GOVERNMENT SERVICES, INC., AND MANAGED HEALTH NETWORK, INC.,

Petitioners,

v.

THOMAS ZABOROWSKI, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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ARGUMENT

Respondents ignore the basis of the petition for a writ of certiorari and blithely assert that California severability law treats all contracts equally. Then, clutching feigned ignorance, Respondents declare that the Ninth Circuit's decision does not conflict with this Court's precedents or those of other courts of appeals, and cite a recent California Supreme Court decision, *Sanchez v. Valencia Holding Co., LLC*, 353 P.3d 741 (Cal. 2015), as a reason for denying review. But Respondents cannot simply wish away California's arbitration-specific rule disfavoring severance. The brief in opposition only confirms that this Court should grant review, or, at a minimum, grant, vacate and remand to allow the Ninth Circuit to reconsider its decision in light of *Sanchez*.

I. California Courts Apply A Different Severance Rule For Agreements To Arbitrate Than For Contracts Generally.

As the petition explains (at 12-14), when it comes to contracts generally, California law takes a very liberal view of severability, holding that if the "illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." *Marathon Entm't, Inc. v. Blasi*, 174 P.3d 741, 743 (Cal. 2008), as modified (Mar. 12, 2008) (citation omitted).

Not so when it comes to agreements to arbitrate. Instead, "[i]n *Armendariz* [*v. Found. Health*

Psychcare Servs.] the California Supreme Court held that more than one unlawful provision in an arbitration agreement weighs against severance." *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 106 (Cal. Ct. App. 2004). Why? Because where an "arbitration agreement contains more than one unlawful provision," that in and of itself "indicate[s] a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 696-97 (Cal. 2000). Therefore, a California court may refuse to enforce the entire arbitration agreement as "permeated by an unlawful purpose." *Id.* at 697.

Rather than try to justify this *Armendariz* arbitration-specific anti-severance rule, or the district court and court of appeals' reliance on it, Respondents ignore it altogether. Although the petition quotes *Armendariz*'s rule five times, Pet. 8-9, 14, 15-16, 26-27, the brief in opposition never mentions it.

Instead, Respondents choose to wish it away. They declare, on the basis of nothing but their own say-so, that California severance rules "appl[y] to all contracts equally." Opp. 2; *see also* Opp. 10 (same); Opp. 14-15 (while the severability "doctrine happens to have been distilled in a case involving an arbitration agreement ... it applies even-handedly to contracts of all sorts."); Opp. 15 (same); Opp. 20 ("Petitioners' claim that there is a special severance standard for arbitration contracts has no basis in California law").

Even worse, the brief in opposition incorrectly asserts, without explanation, that "[n]either *Armendariz* nor the district court here even hinted—much less held—that the presence of multiple unlawful provisions had special significance for arbitration agreements alone." Opp. 19 n.4. Respondents must not have read *Armendariz* or the district court opinion. The California Supreme Court in *Armendariz* did not only hint that the "presence of multiple unlawful provisions had special significance for arbitration agreements," *id.*, it explicitly so held. In the words of *Armendariz*, where an "arbitration agreement contains more than one unlawful provision," that "indicate[s] a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage," and allows a court to conclude, on that basis alone, that the "arbitration agreement is permeated by an unlawful purpose." 6 P.3d at 696-97.

California courts of appeals have interpreted this language to mean exactly what it says—"more than one unlawful provision in an arbitration agreement weighs against severance." *Fitz*, 13 Cal. Rptr. 3d at 106. In other words, the existence of even two substantively unconscionable provisions in an arbitration agreement is *per se* "a circumstance considered by [the California] Supreme Court to 'permeate' the agreement with unconscionability." *Trivedi v. Curexo Tech. Corp.*, 116 Cal. Rptr. 3d 804, 813 (Cal. Ct. App. 2010). Indeed, many California courts of appeals candidly admit that while severance is appropriate "where only one clause in an arbitration agreement [is] found to be substantively unconscionable," it is

"not appropriate" where "multiple provisions" are found unconscionable. *Pinela v. Neiman Marcus Grp., Inc.*, 190 Cal. Rptr. 3d 159, 183-84 (Cal. Ct. App. 2015), reh'g denied (July 29, 2015), review filed (Aug. 11, 2015). Others simply quote the language from *Armendariz* and summarily refuse to sever. *See, e.g., Martinez v. Master Prot. Corp.*, 12 Cal. Rptr. 3d 663, 673 (Cal. Ct. App. 2004); *Ontiveros v. DHL Exp. (USA), Inc.*, 79 Cal. Rptr. 3d 471, 488-89 (Cal. Ct. App. 2008).

This rule applies exclusively to, and disfavors, arbitration agreements. No comparable rule exists for other contracts. California courts do not hold that more than one unconscionable provision in any other type of contract indicates a systematic effort to take advantage of the weaker party, and therefore automatically allows a court to throw out the entire contract. Instead, outside of the arbitration context, "California cases take a very liberal view of severability, enforcing valid parts of an apparently indivisible contract where the interests of justice or the policy of the law would be furthered." *In re Marriage of Facter*, 152 Cal. Rptr. 3d 79, 95 (Cal. Ct. App. 2013) (citation omitted).

None of the cases cited in the opposition brief call the *Armendariz* arbitration-specific rule into question. Respondents cite six cases for the proposition that "California courts have applied the state's" neutral "severability standard" to arbitration and nonarbitration agreements alike. Opp. 16-17. But none show that California's severability standard is "arbitration-neutral," Opp. 3. None hold that outside the context of arbitration agreements, multiple un-

conscionable provisions indicate some sort of systematic unlawful purpose and allow a court to refuse severance. And none disclaim that rule for arbitration agreements.

Indeed, some of the cases Respondents cite have nothing to do with multiple illegal or unconscionable provisions, *see, e.g.*, *Templeton Dev. Corp. v. Superior Court*, 51 Cal. Rptr. 3d 19, 26 (Cal. Ct. App. 2006) (cited at Opp. 17). And others show that outside of arbitration, California courts grant severance unless a contract has "a single, unlawful object," or unless it is so permeated by illegality "as to render the entire agreement void." *MKB Mgmt., Inc. v. Melikian*, 108 Cal. Rptr. 3d 899, 907 (Cal. Ct. App. 2010); *see also Shopoff & Cavallo LLP v. Hyon*, 85 Cal. Rptr. 3d 268 (Cal Ct. App. 2008) (cited at Opp. 16).

The cases that Respondents cite in order to prove that California courts routinely "sever multiple unconscionable provisions in order to save an arbitration agreement" are even further afield. Opp. 20. All but one are not actually from California courts—they are from federal district courts that are located in California. Opp. 20-21. Federal district courts have no power to make California state contract law, and their decisions on questions of California state law are of course not binding on California state courts. *See, e.g.*, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

And the one case that is from a California state court does not actually sever "three provisions" as Respondents assert. Opp. 21. Instead, *Bolter v. Superior Court* severed only the "provisions of the

agreement mandating that all arbitrations take place in the State of Utah," namely: "[A]rbitration proceedings shall be conducted in Salt Lake City, Utah." 104 Cal. Rptr. 2d 888, 894, 896 (Cal. Ct. App. 2001), as modified on denial of reh'g (Mar. 30, 2001).

That does nothing to disprove the petition's central contention: California courts hold that *for agreements to arbitrate, but not for other agreements*, multiple unconscionable provisions in and of themselves "indicate a systematic effort to impose arbitration on [the weaker party] not simply as an alternative to litigation, but as an inferior forum that works to the [stronger party's] advantage," and thus allow a court to conclude that the "arbitration agreement is permeated by an unlawful purpose." *Armendariz*, 6 P.3d at 696-97.

Respondents argue, as a policy matter, that this type of penalty is necessary to prevent employers from "overreach[ing]," secure in the knowledge that the "worst" they could suffer for deliberately inserting illegal clauses into their employment contracts "is the severance of the clause after the employee has litigated the matter." Opp. 12-13 (quoting *Armendariz*, 6 P.3d at 697 n.13); *see also* Opp. 25 n.7. But outside of arbitration, such penalties apply only where contract terms are drafted in bad faith, i.e., with knowledge of their illegality. *See Data Mgmt., Inc. v. Greene*, 757 P.2d 62, 64-65 (Alaska 1988), cited in *Armendariz*, 6 P.3d at 697 n.13. Respondents do not even allege that the Provider Services Task Order Agreement ("Agreement") was drafted in bad faith. Instead, Respondents acknowledge that after they objected to seven separate provisions in the

Agreement, MHN immediately redrafted it to omit all of them. Opp. 3. California's arbitration-only rule cannot be justified on this basis.

II. The Ninth Circuit's Holding Conflicts With This Court's Precedents And With Decisions Of Other Courts Of Appeals.

Respondents' refusal to grapple with the critical language from *Armendariz* and with California courts' embrace of the arbitration-only rule derails the remainder of the brief in opposition.

Respondents' assertion that "the Ninth Circuit's decision does not conflict with this Court's precedent" is based on the faulty premise that the district court and the Ninth Circuit simply applied a "generally applicable contract defense," "drawn from general contract law, for contracts generally." Opp. 21, 23-24. But as earlier noted, the *Armendariz* anti-severance rule does not apply to contracts generally. It applies only to arbitration agreements.

Because there is no comparable rule that more than one unconscionable provision in any contract indicates a systematic effort to take advantage of the weaker party and thus allows a court to throw out the entire agreement, this is not "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Moreover, this Court has held that the Federal Arbitration Act ("FAA") also preempts state law rules purporting to apply to all contracts when they "have a disproportionate impact on arbitration agreements," or when a "generally applicable contract defense" applies, in practice, "only

to arbitration," or "derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746-47 (2011). Here, California's arbitration-only anti-severance rule applies in practice only to agreements to arbitrate and "derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *Id.* Therefore, as Judge Gould explained in dissent, it is properly deemed preempted by the FAA. Pet. App. 7a-8a. The Ninth Circuit's contrary holding conflicts with this Court's decisions. Pet. 16-17.

The Ninth Circuit's decision also conflicts with the decisions of other courts of appeals.[1] Had this case arisen in the Seventh Circuit, the court would have held *Armendariz's* arbitration-only anti-severance rule preempted by the FAA. Pet. 18-19. In *Oblix, Inc. v. Winiecki*, the Seventh Circuit held that any portion of *Armendariz* that "create[s] special requirements" for arbitration clauses beyond those that exist for other "form contracts" is preempted by the FAA. 374 F.3d 488, 492 (7th Cir. 2004). Respondents assert that the Seventh Circuit "did not

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[1] Respondents contend that the Ninth Circuit's unpublished memorandum disposition cannot create a circuit split because it is nonprecedential. Opp. 24-25. But the petition never asserted that the Ninth Circuit's disposition in this case by itself created a circuit split. The conflict with the Seventh Circuit (Pet. 18-19), relies on prior Ninth Circuit precedent, namely *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 926-27 (9th Cir. 2013), Pet. App. 5a-6a. And the conflict regarding express severability clauses is not only with the Ninth Circuit but also with precedential decisions from the California state courts. Pet. 19-21.

notice" any split with the Ninth Circuit because it cited *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003) (en banc), in support of its decision. But *Luce* says nothing about whether *Armendariz* imposes special requirements for arbitration clauses, or whether any such requirements would be preempted by the FAA. *See* 345 F.3d at 752 (citing *Armendariz*, once, on an unrelated proposition of law).

The petition also pointed out that the Ninth Circuit here, and California state courts, routinely fail to honor severability clauses in arbitration agreements or to give them any weight—they simply apply the *Armendariz* anti-severance rule no matter what the agreement says. Pet. 19-21. This disregard for contractual severability clauses conflicts with courts of appeals that have recognized that enforcing such clauses honors the federal policy requiring enforcement of arbitration agreements "according to their terms." *Id.* (quoting *Concepcion*, 131 S. Ct. at 1745).

Respondents first offer a nonresponse. They say that no circuits hold that under federal law the presence of a severability clause always requires severance. Opp. 26-27. True, but other courts honor severance clauses when possible, and at least give them weight, Pet. 19-21, whereas a severance clause in an arbitration agreement means nothing in California if a court finds more than one unconscionable term.

As to particular cases, Respondents contend that *Morrison v. Circuit City Stores, Inc.*, does not conflict

with the Ninth Circuit's decision because it was based on Ohio law, not the FAA. Opp. 27. But in *Morrison*, the Sixth Circuit held that the question was unclear under Ohio law. 317 F.3d 646, 675 (6th Cir. 2003). It therefore relied on "[U.S.] Supreme Court precedent dictat[ing] that we resolve any doubts as to arbitrability in favor of arbitration," and the federal policy favoring arbitration. *Id.* (internal quotation marks omitted).

Similarly, in *Gannon v. Circuit City Stores, Inc.*, the Eighth Circuit held that enforcing a severability clause was consistent with the "FAA's policy favoring the enforcement of arbitration agreements." 262 F.3d 677, 683 (8th Cir. 2001). Respondents assert that *Gannon* "join[ed] the Ninth Circuit in recognizing that courts can, consistent with the FAA ... refuse to sever when there is too much overreaching by the drafter." Opp. 29. But *Gannon* actually *rejected* the plaintiff's assertion that severance would "encourage[] employers to include improper terms in arbitration agreements." 262 F.3d at 682 n.7.

So did *Booker v. Robert Half Int'l, Inc.* The plaintiff maintained that severing "illegal provisions in arbitration agreements" would "leave[] employers with every incentive to 'overreach' when drafting such agreements." 413 F.3d 77, 84 (D.C. Cir. 2005). The court disagreed, and held that honoring the parties' severability clause was "faithful to the federal policy which requires that we rigorously enforce agreements to arbitrate." *Id.* at 84-86 (citation and internal quotation marks omitted).

All of these decisions conflict with the Ninth Circuit's, and the California courts', disregard for severability clauses in agreements to arbitrate.

III. This Case Is A Good Vehicle For Rejecting The *Armendariz* Anti-Severance Rule.

Respondents finally assert that "[n]ow is not an opportune time for this Court to take up the issue presented here," and "this Court would do better" to let the effects of *Sanchez v. Valencia Holding Co., LLC*, "take shape before deciding whether the issue presented ... merits review." Opp. 31, 33.

In *Sanchez*, the California Supreme Court revisited California's unconscionability doctrine, reversing a finding of substantive unconscionability as to four provisions and clarifying that California's "unconscionability standard is, as it must be, the same for arbitration and nonarbitration agreements." 353 P.3d at 749. *Sanchez*, on the surface at least, heeds *Concepcion's* commands. It says nothing, however, about the *Armendariz* anti-severance rule. In fact, it says nothing about severability at all. Therefore, *Sanchez* provides no basis for denying review here. This Court should grant review and reject the *Armendariz* anti-severance rule (which Respondents do not even defend) as being contrary to the FAA and this Court's precedents.

If this Court, however, believes that *Sanchez* calls the Ninth Circuit's decision in this case into question, the proper response is to grant the petition and vacate and remand to the Ninth Circuit for fur-

ther consideration in light of *Sanchez*. As this Court has explained, a grant, vacate and remand is appropriate "[w]here intervening developments ... reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 896 (1997). Here, the Ninth Circuit never acknowledged that California's unconscionability standard "must be ... the same for arbitration and nonarbitration agreements." *Sanchez*, 353 P.3d at 749. It did not grapple with the fact that "the standard for substantive unconscionability—the requisite degree of unfairness beyond merely a bad bargain—must be as rigorous and demanding for arbitration clauses as for any contract clause." *Id.* And it never addressed how *Armendariz*'s arbitration-only severance rule could be compatible with *Sanchez*. Instead, the Ninth Circuit simply rubber stamped the district court's holding that "multiple aspects of the arbitration provision are substantively unconscionable" and could not be severed. Pet. App. 3a-5a.[2] There is a reasonable probability that the Ninth Circuit would assess the

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[2] These include a six-month limitations period (which purportedly did not give Respondents enough time to discover that they were being treated as independent contractors instead of employees, even though the Agreement Respondents signed spells this out at Pet. App. 52a-53a); a clause awarding fees and costs to the substantially prevailing party; a $2600 filing fee; and a punitive damages waiver (even though the Fair Labor Standards Act does not actually provide for punitive damages).

provisions differently, and decide the entire case differently, in light of *Sanchez*.

CONCLUSION

The petition for a writ of certiorari should be granted, or, in the alternative, this Court should grant, vacate and remand to allow the Ninth Circuit to reconsider its ruling in light of *Sanchez v. Valencia Holding Co.*

Respectfully submitted,

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IN THE

Supreme Court of the United States

MHN GOVERNMENT SERVICES, INC., AND MANAGED HEALTH NETWORK, INC.,

Petitioners,

v.

THOMAS ZABOROWSKI, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION AND THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONERS

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July 10, 2015

QUESTION PRESENTED

Whether California's severability rule, as applied to agreements to arbitrate, is preempted by the Federal Arbitration Act when California law applies a different rule of contract severability to contracts in general and when the arbitration agreement contains an express severability clause.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amici curiae* Atlantic Legal Foundation and International Association of Defense Counsel state the following:

Atlantic Legal Foundation is a not for profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no shareholders, parents, subsidiaries or affiliates.

The International Association of Defense Counsel is a non-profit professional association. It has no parent company and no shareholders.

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INTEREST OF *AMICI CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists. Atlantic Legal's directors and advisors are familiar with the role arbitration clauses play in the contracts entered into between companies and between companies and consumers. Some of Atlantic Legal's directors and advisers have decades of experience with arbitration – as

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[1] Pursuant to Rule 37.2(a), timely notice of intent to file this brief was given to all parties and all parties have consented to the filing of this brief. The consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

legal counsel, as arbitrators, and as members or supporters of organizations that administer arbitration regimes. They are familiar with the benefits of arbitration, especially the role of arbitration (and other "alternative dispute resolution" mechanisms) in facilitating business and commerce and in alleviating the burdens on courts and parties.

The International Association of Defense Counsel ("IADC"), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of class actions as well as arbitrations, both of which are increasingly global in reach.

The abiding interest of *amici* in the benefits of arbitration is exemplified by their participation as *amicus* and as counsel for *amici* in *American*

Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013) and most recently in *DIRECTV, Inc. v. Imburgia*, No. 14-462, currently before the Court.

Amici believe that the decisions of the Court of Appeals for the Ninth Circuit and the district court in this case are inconsistent with the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* ("FAA") and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) in which this Court held that the FAA means exactly what it says: Agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."(*Id.* at 1745, quoting 9 U.S.C. § 2). The FAA preempts state laws that expressly disfavor arbitration agreements. The FAA also preempts "generally applicable contract defenses," which purport to apply to all contracts, but which in practice apply "only to arbitration" or that "derive their meaning from the fact that an agreement to arbitrate is at issue," *(id.* at 1746) or which "have a disproportionate impact on arbitration agreements." (*Id.* at 1747).

PRELIMINARY STATEMENT

In the instant case the parties agreed to arbitrate their disputes, and they agreed that if any specific terms of the agreement were deemed invalid or unenforceable, a court should sever those terms and enforce the remainder of the agreement.

In construing and enforcing contracts generally, California courts honor severability provisions, as opposed to invalidating the entire agreement, unless the core purpose of the agreement is illegal or unless doing so would be impossible without rewriting the agreement. In contrast, in construing agreements to arbitrate, California courts hold that the existence of more than one invalid provision can be interpreted by a court to indicate that the "stronger party" sought to use arbitration not simply as an alternative to litigation, but as a tool to take advantage of the "weaker party." The court can therefore refuse severance and, instead, simply invalidate the entire agreement to arbitrate. This, we submit, shows a clear bias against arbitration.

Petitioners are military contractors who contract with the Department of Defense to provide military service members and their families with confidential life-skills counseling. Consultants who work for petitioners, including respondents Zaborowski and Baldini, are

independent, highly-trained, and well-educated professionals who hold graduate degrees and professional licenses that require advanced training. Pet. 4-5.

Respondents signed a contract, the Provider Services Task Order Agreement (hereafter the "Agreement"), which contains a section captioned "**Mandatory Arbitration**" in bold and underlined typeface written in the same type font and type size as the rest of the contract. The arbitration provision requires that the parties confer in good faith to resolve any problems or disputes that may arise under the Agreement as a condition precedent to any arbitration demand by either party, and that any controversy or claim arising out of or relating to the Agreement, or breach thereof, shall be settled by final and binding American Arbitration Association arbitration in San Francisco, California before a single, neutral arbitrator who is licensed to practice law to be chosen by the consultant (called the "Provider") from a list of three neutral arbitrators provided by MHN. The Mandatory Arbitration clause further states that the parties waive their right to a jury or court trial. The Arbitration clause also stipulates that the decision of the arbitrator shall be final and binding, and that the arbitrator shall have no authority to make material errors of law, to award punitive damages, to add to, modify or

refuse to enforce any agreements between the parties, or to make any award that could not have been made by a court of law. The Arbitration clause also provides that the prevailing party, or substantially prevailing party's costs of arbitration, are to be borne by the other party, including reasonable attorney's fees. Pet. 5-7; Pet. App. 56a-57a.

The Agreement also contains an express severability clause, captioned "**Severability**", which, like the arbitration clause, is in the same typeface and type size as the rest of the Agreement and provides that if "any provision of this Agreement is rendered invalid or unenforceable . . . the remaining provisions of this Agreement shall remain in full force and effect." Pet. 7, Pet. App. 5a.

Respondents filed a putative class-action lawsuit in district court against Petitioners, alleging violations of the Fair Labor Standards Act. Pet. 7 Petitioners moved to compel arbitration, which Respondents opposed. The district court, applying California law, concluded that multiple terms in the arbitration agreement were unconscionable. Pet. 8, Pet. App. 17a-28a. The district court refused to sever the purportedly unconscionable provisions of the arbitration clause. The district court noted that, under California law, a court may decline a request to sever a contract

when the contract "is permeated by unconscionability." Pet. App. 29a (internal quotation marks omitted). The court invalidated the entire arbitration agreement, holding that "[t]he finding of 'multiple unlawful provisions' allows a trial court to conclude that 'the arbitration agreement is permeated by an unlawful purpose'" and to deny severance. *Id.* (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 697 (Cal. 2000)).

A divided panel of the Ninth Circuit affirmed. The majority of the panel agreed with the district court that multiple provisions of the arbitration agreement were unconscionable. Pet. 8, Pet. App. at 2a-4a.

First, the panel held, the arbitrator-selection clause is substantively unconscionable because it gives MHN the "power to control arbitrator candidates" citing *Chavarria v. Ralph's Grocery Co.*, 733 F.3d 916, 923-26 (9th Cir. 2013) Pet. App. 3a. But, as the panel itself acknowledged, the Agreement requires that those arbitrators be "neutral." *Second*, the panel held that the Agreement's six month limitations period is substantively unconscionable because, given the nature of plaintiffs' claims, the limitations period works as a "practical abrogation of the right of action," citing *Ellis v. U.S. Sec. Assocs.*, 169

Cal.Rptr.3d 752, 757 (Cal. Ct. App. 2014). Pet. App. 3a.

Third, the costs-and-fee-shifting clause, which awards fees and costs to the "prevailing party, or substantially prevailing party[]," is, in the panel's view, "substantively unconscionable" because it results in an "unreasonable" and "unexpected" allocation of risks, citing *Samaniego v. Empire Today LLC*, 140 Cal.Rptr.3d 492, 497 (Cal. Ct. App. 2012) because even if plaintiffs prevail on some of their claims but not all, they may still be required to pay MHN's attorney's fees and costs; this provision, the panel wrote, is contrary to the applicable statutory cost-shifting regimes provided by California and federal law, which entitle only the prevailing plaintiff to an award of costs and fees. The effect of this fee-award clause, the Panel said, deters employees from seeking vindication of their rights by pursuing arbitration. Pet. App. 4a. However, California Code of Civil Procedure § 1021 provides that "[e]xcept as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties." Moreover, California Civil Code § 1717 (b)(1) provides that "the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract," a concept quite similar to the

Agreement's "substantially prevailing party" language. *Finally*, the panel held, the "filing fees and punitive damages waiver" provisions are "substantively unconscionable" because the American Arbitration Association's filing fee hampers the employee more than it does MHN, and the punitive damages waiver "improperly proscribes available statutory remedies" afforded to plaintiffs bringing employment claims. Pet. App. 4a, citing *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1179 (9th Cir. 2003). The filing fee and punitive damages waiver provisions are facially neutral. The specifics of the filing fee provision are, of course, unique to arbitration, and to that extent the panel's decision does not rest on a defense "generally applicable" to all contracts.[2]

The Circuit Court panel also upheld the district court's denial of severance. The panel majority relied on *Samaniego*, 140 Cal.Rptr.3d at 501 which held: "An arbitration agreement can be considered permeated by unconscionability if it 'contains more than one unlawful provision Such multiple defects indicate a systematic effort to impose

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[2] In some respects, arbitration is more accessible to individual plaintiffs than court litigation; for example, arbitration procedures usually limit discovery, which is frequently prolonged and expensive. Indeed, the Agreement at issue circumscribes discovery. *See* Agreement, § 20, Pet. App. 56a.

arbitration . not simply as an alternative to litigation, but as an inferior forum that works to the [stronger party's] advantage.'" Pet. 8-9; Pet. App. 5a.

The panel majority rejected MHN's preemption arguments as "foreclosed by" Ninth Circuit precedent, and held that the severability analysis was not "impermissibly unfavorable to arbitration." Pet. App. 5a-6a (citing *Chavarria*, 733 F.3d at 926-27

Circuit Judge Gould dissented. Judge Gould wrote that *Armendariz* was decided more than a decade before the Supreme Court's decision in *Concepcion* and that "[t]he reasoning in *Armendariz* that multiple unconscionable provisions will render an arbitration agreement's purpose unlawful has a disproportionate impact on arbitration agreements' and should have been preempted." Pet. App. 8a (quoting *Concepcion*, 131 S. Ct. at 1747). Judge Gould further observed that "*Concepcion* and its progeny should create a presumption in favor of severance when an arbitration agreement contains a relatively small number of unconscionable provisions that can be meaningfully severed and after severing the unconscionable provisions, the arbitration agreement can still be enforced." *Id.*

Remarkably, the Ninth Circuit panel majority seemed to ignore entirely this Court's holding in *Concepcion*, which it cited not once.

The Ninth Circuit denied further review Pet. 10, Pet. App. 31a.

SUMMARY OF ARGUMENT

California courts routinely display the very hostility to arbitration that the FAA was designed to end. Indeed, this case, and cases such as *DIRECTV v. Imburgia*, No. 14-462, presently before the Court, demonstrate that California law, whether construed by state courts or by federal courts sitting in California, is frequently in conflict with the language and purpose of the FAA and this Court's FAA jurisprudence.

The Ninth Circuit's decision upholding California's unconscionability/non-severability rule is contrary to binding precedent of this Court construing the FAA.[3] This Court's review is necessary to effectuate the primacy of federal arbitration law

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[3] The decision below also creates conflicts among the circuits, as the Petition amply shows. *See* Pet. at 18-21.

ARGUMENT

I.

THE DECISIONS BELOW ARE INCONSISTENT WITH THE FEDERAL ARBITRATION ACT AND THIS COURT'S TEACHING ON THE ENFORCEABILITY OF ARBITRATION AGREEMENTS

Amici urge this Court to grant the petition and, ultimately, on the merits, reverse the Court of Appeal's decision and reaffirm this Court's holdings in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) and numerous other cases which recognize the overriding Congressional policy favoring arbitration.

This Court has repeatedly held that the "fundamental principle [is] that arbitration is a matter of contract," *Concepcion*, 131 S. Ct. at 1745 (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)); *see also Stolt-Nielsen*, 559 U.S. at 681; *Volt Information Scis., Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989), and that courts must enforce arbitration agreements according to their terms, *Volt*, 489 U.S. at 478; *Stolt-Nielsen*, 559 U.S. at 682; *Concepcion*, 131 S. Ct. at 1748.

The FAA, and section 2 in particular, "was intended to 'revers[e] centuries of judicial hostility to arbitration agreements,' by 'placing arbitration agreements upon the same footing as other contracts.'" *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-226 (1987) (citations omitted). The FAA reflects "a 'liberal federal policy favoring arbitration.'" *Concepcion*, 131 S. Ct. at 1745 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)."[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone*, 460 U.S. at 24-25 & n.32; *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626 (1985). California courts often ignore these precepts.

State courts may refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2. However, state law rules purporting to apply to all contracts are preempted by the FAA if they "have a disproportionate impact on arbitration agreements." *Concepcion*, 131 S. Ct. at 1747. Preemption also applies when a "generally applicable contract defense," applies, in practice, "only to arbitration" or "derive[s] [its] meaning from the fact that an agreement to arbitrate is at

issue." *Id.* at 1746; *see also, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203-04 (2012); *Rent-A-Center*, 561 U.S. at 67-68; *Preston v. Ferrer*, 552 U.S. 346, 356 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443-44 (2006); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88 & n.3 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 16 & n.11 (1984).

The California law at issue here – which encourages courts to void arbitration agreements that contain clauses that are deemed unconscionable, rather than to sever the offending provisions and preserve the essence of the agreement to arbitrate – is preempted by federal law. The state court decisions on which the courts below rely evince a strong aversion to parties' rights to contract for arbitration and the continued "judicial hostility towards arbitration" that the FAA was intended to foreclose. *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*), quoting *Concepcion*, 131 S. Ct. at 1745, 1747, 1757; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

California courts generally enforce valid parts of a contract: "It is settled that where a contract has both void and valid provisions, a court may

sever the void provision and enforce the remainder of the contract." *Adair v. Stockton Unified School Dist.*, 77 Cal.Rptr.3d 62 (Cal. Ct. App. 2008) (employment contract), citing California Civil Code § 1599. This has been the rule for a century, and remains so today. *See Hedges v. Frink*,163 P. 884, 885 (Cal. 1917); *Symcox v. Zuk*,34 Cal.Rptr. 462, 466 (Cal. Dist. Ct. App. 1963); *In re Marriage of Facter*, 152 Cal.Rptr.3d 79, 95 (Cal. Ct. App. 2013); *see also* 1 Witkin, Summary of Cal. Law Contracts, § 422, at 463-464 (10th ed. 2005) and cases cited therein.

A court will commonly determine severance is appropriate unless "the central purpose of the contract is tainted with illegality." *Marathon Entertainment, Inc. v. Blasi*, 174 P.3d 741, 754 (Cal. 2008). If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. On the other hand, if the illegality is collateral to the main purpose of the contract, and the illegal provision can be excised from the contract by means of severance or restriction, then such severance and restriction are appropriate. *See Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 985-86 (Cal. 2003). Only "[i]f the court is unable to distinguish between the lawful and unlawful parts of the agreement" may the court invalidate the entire contract. *Birbower, Montalbano, Condon & Frank v. Super. Ct.*, 949

P.2d 1, 12 (Cal. 1998).[4] In *Birbrower*, the California Supreme Court was dealing with attorney's fees – both fixed fee and contingency fee arrangements – and held that nothing in the nature of the agreement was an obstacle to severance. It directed the trial court to determine, on remand, whether a partially valid agreement existed, and, if so, what value should be attributed to legally provided services. *Birbrower*, 949 P.2d at 12-13. The central purpose of the Agreement in this case, and of the arbitration provision of it, cannot be said to be tainted with illegality.

Moreover, the relative bargaining power of the parties, which is the rationale for disfavoring arbitration provisions in employment or consumer contracts, is not always decisive. California routinely enforces limited warranties and other terms found in form contracts, sometimes called "contracts of adhesion." *See, e.g., Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.*, 107 Cal.Rptr.2d 645 (Cal. Ct. App. 2001) (indemnification); *Olsen v. Breeze, Inc.*, 55 Cal.Rptr.2d 818 (Cal. Ct. App. 1996) (release); *Allan v. Snow Summit, Inc.*, 59 Cal.Rptr.2d 813 (Cal. Ct. App. 1996)(promise to accept risk of

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[4] Judge Gould showed that one can readily distinguish between the lawful and allegedly unlawful parts of the Agreement, excise the unlawful parts, and still preserve the essence of the agreement to arbitrate. Pet. App. 8a-10a.

injury and to hold ski resort harmless). But California courts treat arbitration agreements differently, and impose on form arbitration clauses more or different requirements from those imposed on other contract clauses.[5]

One of the cases on which the Ninth Circuit panel relied extensively, *Armendariz*, creates special requirements and establishes special hurdles for arbitration agreements. It applies a bright-line rule disfavoring severability and favoring nullification in the context of arbitration agreements when there is none in the context of ordinary contracts, and thus the FAA would preempt this decision for its bias against agreements to arbitrate. Because *Armendariz* treats arbitration clauses more unfavorably than

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[5] Unlike many such contracts, the arbitration and severability provisions of the contracts between MHN and respondents were in the same very readable type size as all other parts of the document and the title of the section was set out in bold font. There was no attempt to hide or minimize those provisions. Moreover, respondents and other consultants are highly-educated professionals, well able to understand the agreement they signed. In *Samaniego*, the plaintiffs were low-level manual laborers, not proficient in English, *see* 140 Cal.Rptr.3d at 498; *see also Higgins v. Superior Court*, 45 Cal. Rptr.3d 293 (Cal. Ct. App. 2006) (the parties to an agreement to appear in reality television program were young and unsophisticated).

other types of contracts, under *Concepcion* it is preempted.

It is noteworthy that while some California cases seem to acknowledge that *Armendariz* has been "abrogated in relevant part on other grounds" by *Concepcion*, the Ninth Circuit panel did not. *See, e.g., Herskowitz v. Apple Inc.*, 940 F Supp. 2d 1131, 1144 (N.D. Cal. 2013), *Oguejiofor v. Nissan*, 2011 WL 3879482 at *8 (N.D.Cal. 2011), *Baeza v. Superior Court*, 135 Cal.Rptr.3d 557 (Cal. Ct. App. 2011), *Lona v. Citibank, N.A.*, 134 Cal. Rptr.3d 622, 637 (2011), *GAR Energy & Associates, Inc. v. Ivanhoe Energy Inc.*, No. 1:11-CV-00907 AWI, 2011 WL 6780927, at *8 (E.D. Cal. Dec. 27, 2011), *report and recommendation adopted*, 2012 WL 174952 (E.D. Cal. Jan. 20, 2012). Indeed, as noted above, the panel's decision does not even cite *Concepcion*.

California courts treat arbitration agreements quite differently and exhibit the very suspicion of and hostility towards arbitration this Court has denounced. *Samaniego*, for example, holds that when an "arbitration agreement contains more than one unlawful provision," that fact by itself "indicate[s] a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." *Samaniego*, 140 Cal.Rptr.3d at 501 (Cal. Ct. App. 2012), cited by the Ninth Circuit panel, Pet. App.

5a. *See also Broughton v. Cigna*, 988 P.2d 67, 78 (Cal. 1999) ("The judicial forum has significant institutional advantages over arbitration in administering a public injunctive remedy, which as a consequence will likely lead to the diminution or frustration of the public benefit if the remedy is entrusted to arbitrators."); *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157, 1163 (Cal. 2003) ("Arbitration cannot necessarily afford all the advantages of adjudication in the area of private attorney general actions, that in a narrow class of such actions arbitration is inappropriate, and that this inappropriateness does not turn on the happenstance of whether the rights and remedies being adjudicated are of state or federal derivation," and that this Court's decisions in *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) do not weaken the California court's holding in *Broughton*.)

This Court has repeatedly rejected such "generalized attacks on arbitration that rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law." *See, e.g., Green Tree Fin. Corp.-Ala.*, 531 U.S. at 89-90 (quotation omitted); *Circuit City Stores, Inc.* (mandatory arbitration agreements in the employment context fall under the FAA).

As Judge Easterbrook noted in *Oblix, Inc., v. Winiecki*, 374 F.3d 488 (7th Cir. 2004) , arbitration clauses usually are supported by consideration – in this case the consultant's compensation. Contracts typically, contain "bundles of rights and obligations" of both parties. An arbitration clause is no more suspect, or any less enforceable, than the other provisions. Arbitration was as much a part of the meeting of the minds between MHN and the consultants as were the consultant's pay and benefits, confidentiality undertakings, and other terms.

Severance of provisions found to be illegal or unenforceable would give effect to the intent of the contracting parties, which was the "preeminent concern" of Congress in passing the FAA – "to enforce private agreements into which parties had entered." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *see also Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. at 479 (1989) ("the FAA's primary purpose" was to "ensur[e] that private agreements to arbitrate are enforced according to their terms").

California's "two strikes and you're out" rule (*see Samaniego*, 140 Cal.Rptr.3d at 501 ("'An arbitration agreement can be considered permeated by unconscionability if it contains more than one unlawful provision . . . .'" (emphasis added)); *see also Lhotka v. Geographic Expeditions,*

Inc., 104 Cal.Rptr.3d 844, 853 (Cal. Ct. App. 2010); *Parada v. Super. Ct.*, 98 Cal.Rptr.3d 743, 769 (Cal. Ct. App. 2009), is clearly inimical to the principle that state law cannot disfavor arbitration. Under the California standard, as applied by the lower courts in this case, the mere existence of multiple "unlawful provisions" allows a trial court to conclude that "the arbitration agreement is permeated by an unlawful purpose" and to deny severance. *See Armendariz*, 6 P.3d at 697); *see also Carmona v. Lincoln Millennium Car Wash, Inc.*, 171 Cal.Rptr.3d 42, 55 (Cal. Ct. App. 2014). *Armendariz* sets categorical requirements specific to arbitration clauses.[6]

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[6] *Armendariz* sets forth four "minimum requirements for the arbitration of nonwaivable statutory claims," including claims of discrimination in employment asserted under the FEHA. *Armendariz*, 6 P.3d at 757-758, 766. First, the arbitration agreement "may not limit statutorily imposed remedies such as punitive damages and attorney fees." (*Id.* at 759.) Second, "adequate discovery is indispensable for the vindication of FEHA claims," and employees "are at least entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses...." (*Id.* at 760, 761.) Third, "in order for . judicial review to be successfully accomplished, an arbitrator in a FEHA case must issue a written arbitration decision that will reveal, however, briefly, the essential findings and conclusions on which the award is based." (*Id.* at 762.) Fourth, "when an employer imposes mandatory arbitration as a condition of

(continued...)

The *Armendariz* court, too, refused to apply the FAA. Instead, it held that arbitration agreements should be reviewed with "a particular scrutiny." 6 P.3d at 757. It described arbitration as a potential "instrument for injustice," *id.* at 768, and an "inferior forum," *id.* at 775, rife with "disadvantages that may exist for plaintiffs arbitrating disputes," *id.* at 770. Among these were "the fact that courts and juries are viewed as more likely to adhere to the law and less likely than arbitrators to 'split the difference' between the two sides, thereby lowering damages awards for plaintiffs." *Id.*

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[6](...continued)
employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." (*Id.* at 765, italics omitted.) The court in *Armendariz* further held that employer agreements purporting to require arbitration of nonwaivable statutory claims meeting these four "minimum requirements" must additionally be scrutinized under the principles of unconscionability "that apply more generally to any type of arbitration imposed on the employee by the employer as a condition of employment, regardless of the type of claim being arbitrated." (*Id.* at 766.) The California Supreme Court reiterated these principles of unconscionability applicable to arbitration agreements in *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, 282 P.3d 1217 (Cal. 2012).

Armendariz openly displays the kind of hostility to arbitration that this Court has repeatedly criticized. In short, the rules derived from *Armendariz* – including the severance rule – do not treat arbitration agreements equally with ordinary contracts, as the FAA requires. *See, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 266 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 231-32 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

As Circuit Judge Gould showed in his dissent, severance of the "offending" clauses would have given effect to the intent of the contracting parties and ensured that the essence of their agreement to arbitrate would be enforced. Applying a different rule to arbitration that treats arbitration agreements less favorably than other contractual promises, as California does, and the Ninth Circuit did in this case, violates the FAA.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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July 10, 2015

No. 14-1458

In The
Supreme Court of the United States

MHN GOVERNMENT SERVICES, INC.,
AND MANAGED HEALTH NETWORK, INC.,

Petitioners,

v.

THOMAS ZABOROWSKI, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF MARY A. BEDIKIAN, DANIEL BARNHIZER AND GEORGE T. ROUMELL, JR. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

For over thirty years, this Court has made clear that in enacting the Federal Arbitration Act ("FAA"), the goal of Congress was to equalize arbitration agreements with all other contracts by ensuring their enforceability in the face of hostile state law. *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984); *Perry* v. *Thomas*, 482 U.S. 483 (1987); *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995); *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996); *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011). Thus, state laws cannot single out arbitration agreements for different treatment without contravening the letter and spirit of the FAA.

Here, the Ninth Circuit failed to apply a clear and unambiguous contract severability clause. If that clause had been applied, problematic parts of the contract could have been severed while preserving the remainder. Instead of proceeding in this fashion, the courts below employed a standard to assess contract unconscionability that differs from the standard used when arbitration is not at issue. On that basis, the parties' clear agreement to arbitrate was defeated.

The result here circumvents the mandate of the FAA, which has been construed broadly by this Court to ensure that arbitration remains a viable alternative to the judicial process. *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Co.*, 460 U.S. 1 (1983) (declaring a liberal federal policy favoring arbitration).

QUESTION PRESENTED – Continued

The rationale which drove the decision below will have a recurring, detrimental impact on rights guaranteed by the FAA unless this Court intervenes.

The question presented is whether California's arbitration-only severability rule is preempted by the FAA.

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BRIEF OF MARY A. BEDIKIAN, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

Mary A. Bedikian is a Professor of Law in Residence and Director of the ADR Program at Michigan State University College of Law. She is also of counsel to the National Center for Dispute Settlement ("NCDS") and a former Vice-President of the American Arbitration Association ("AAA"),[2] both of which are ADR service providers. She is joined in this *amici* brief by Daniel Barnhizer, Professor of Law and Bradford Stone Faculty Scholar, and George T. Roumell, Jr., a member of the National Academy of Arbitrators and Professor of Labor Arbitration, both affiliated with Michigan State University College of Law.

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[1] Pursuant to Supreme Court Rule 37, *amici curiae* state that this brief has not been authored in whole or in part by counsel for a party in this case, and no entity other than the *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. *Amici* file this brief with written consent from all parties and all parties received timely notice.

[2] Formerly, Vice-President, American Arbitration Association (1975-2003). Professor Bedikian served on the AAA's Employment Task Force and the Labor Arbitration Task Force, assisted in the promulgation of rules and due process protocols, and trained both employment and commercial arbitrators nationally.

The arbitration agreement invalidated by the Ninth Circuit in this case is found in a standard counseling services contract that *explicitly* references the rules of the AAA. AAA is an independent, private 501(c)(3) organization that provides domestic and international dispute resolution services to parties in conflict. Founded in 1926, one year after the passage of the Federal Arbitration Act, AAA's mandate includes: (a) administering informal dispute resolution mechanisms; (b) training mediators and arbitrators; (c) designing ADR systems; and (d) promoting the responsible use of ADR.

AAA is the largest provider of alternative dispute resolution services in the world. Each year, AAA processes hundreds of thousands of international, labor, employment, construction and commercial cases. Its rules are time-tested and due process-compliant. This Court has relied on the expertise and reputation of the AAA through *amicus* filings in numerous arbitration cases that have been decided in favor of arbitration over the last twenty years. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995); *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996); *Stolt-Nielsen S.A.* v. *Animal Feeds Int'l Corp.*, 559 U.S. 662 (2010); *BG Grp. PLC* v. *Republic of Argentina*, 143 S. Ct. 1198 (2014).

The Ninth Circuit's decision here seriously undercuts enforcement of arbitration agreements by

refusing to apply the state law contract severability principles that govern when arbitration is not at issue. It is imperative that this Court grant the writ to assure that arbitration contracts are treated with equal dignity by state contract law, as Congress intended by the FAA.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is commonplace today for virtually every industry in the United States to employ some form of ADR, notably arbitration. "The proliferation of arbitration agreements in employment and commercial contracts has increased exponentially over the past century as employers and businesses, intent on avoiding the judicial system for resolving disputes, have incorporated arbitration clauses into virtually all of the standardized form contracts." Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 41 (2006); see also Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89 ("Arbitration clauses now appear in many of the form contracts through which consumers obtain goods, services and credit."). Thus, this case has broad implications for all United States businesses and industries that use arbitration, and for all major service providers that promulgate rules and

procedures under which civil disputes subject to arbitration clauses are administered. These organizations include the American Arbitration Association, the International Centre for Dispute Resolution [the international arm of AAA], JAMS/Endispute, International Center for Public Resources [formerly, Center for Public Resources], and the National Center for Dispute Settlement.

The decision below and its rationale jeopardize widely-employed dispute resolution clauses. The Ninth Circuit repudiates the strong public policy in favor of arbitration by invalidating an unambiguous, bilateral arbitration agreement under the guise of declaring it procedurally and substantively unconscionable. In doing so, the court applied principles of California contract law that discriminate against arbitration agreements by subjecting them to a contract law analysis that disfavors the severance of unconscionable provisions in otherwise enforceable contracts.

The Ninth Circuit's decision not to sever purportedly unconscionable terms or provisions undermines the strong federal policy promoting arbitration. The provisions declared unconscionable here do not affect the central purpose of the contract. Most importantly, their elimination as unconscionable would not contravene the parties' remaining, intended contract terms or prevent arbitration from moving forward in an effective manner. Consequently, contract severance principles should apply just as they would if arbitration was not at issue. This Court has repeatedly

upheld the enforcement of arbitration arising out of both voluntary and mandatory arbitration clauses when the claimant is able to achieve equal treatment in the arbitral forum. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The Ninth Circuit's failure to apply the contract's severability clause violates the FAA's mandate that arbitration agreements should be placed on the same footing as all other contracts. *Southland* v. *Keating*, 465 U.S. 1 (1984); *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996).

Even assuming the existence of substantively unconscionable provisions in the contract here, the proper remedy would have been to sever the offensive provisions, and permit arbitration to take place. Although the decision to sever is left to trial court discretion, in exercising that discretion courts must look to *the central purpose of the contract* to determine whether it is tainted with illegality or whether the illegality is collateral to the contract's main purpose. *Pokorny* v. *Quixtar, Inc.*, 601 F.3d 987, 1005 (9th Cir. 2010). In this case, two factors favor severance. First, the parties explicitly incorporated the AAA rules into their contract. If substantive defects exist in the drafted arbitration agreement, AAA rules can correct or supplant those deficiencies without impairing the purpose of the contract or the effectiveness of its arbitration provision. Second, AAA's rules, designed to function independently of each other,

offer additional protections to ensure that all parties in arbitration operate on an equal playing field.

REASONS TO GRANT THE WRIT

I. The Ninth Circuit's Decision Not To Sever Purportedly Unconscionable Provisions From An Otherwise Valid Arbitration Clause Is Antithetical To This Court's Precedent Favoring Arbitration

The FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The Federal Arbitration Act, 9 U.S.C. §§ 1-16, provides that "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce * * * shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. § 2 (emphasis supplied).

The primary goal of Congress in enacting the FAA was to *equalize arbitration agreements* with all other contracts by ensuring their enforceability in the face of hostile state law. *Perry* v. *Thomas*, 482 U.S. 483, 493 (1987) ("A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [section] 2".).

Section 2's expression of public policy favoring arbitration has been repeatedly validated by this Court. *Southland* v. *Keating*, 465 U.S. 1, 10 (1984) ("In enacting § 2 of the [F]ederal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."); *Volt Info. Scis., Inc.* v. *Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) ("[E]ven when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law—that is to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (citation omitted)); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) ("[T]he FAA's purpose [was] to reverse the longstanding judicial hostility to arbitration * * * and to place arbitration agreements upon the same footing as other contracts."); *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996) ("By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" (citation omitted)).

Despite § 2's directive that arbitration agreements be free from the effects of state laws that discriminate against them, California law continues to display its hostility toward arbitration by applying

to arbitration a totally different test of procedural and substantive unconscionability. *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011); see also similar manifestations of ingrained bias by California state courts illustrated by two decisions: *Bruni* v. *Didion*, 160 Cal. App. 4th 1272 (2008) and *Baker* v. *Osbourne Dev. Corp.*, 159 Cal. App. 4th 884 (2008).[3] In stark contrast to how it addresses severability when other contract terms are potentially unenforceable, California greatly restricts access to severance when arbitration rights are at issue.[4] Such discrimination is

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[3] *Baker* v. *Osborne Dev. Corp.*, 159 Cal. App. 4th 884 (2008), found unconscionability in an arbitration clause because it was one-sided, meaning that one party would have reason to institute legal proceedings. Shortly after *Baker*, a different panel of California's Fourth District Court of Appeal decided *Bruni v. Didion*, 160 Cal. App. 4th 1272 (2008). *Bruni* holds that an arbitration clause could be invalidated because it covered all disputes that might arise between the parties. Between *Bruni* and *Baker*, it is unclear how arbitration clauses of any scope in California can survive—one seeks the broadest scope of dispute coverage and full bilateral application while the other limits the scope of disputes that can be subjected to arbitration. Given this incompatibility, it is difficult to see how a party could navigate between this arbitral Scylla and Caribdis.

[4] Petition ("Pet.") 12-16; see also Steven A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How The California Courts Are Circumventing The Federal Arbitration Act*, 3 HASTINGS BUS. L. J. 39 (2006) (concluding from an extensive empirical review of California Court of Appeal cases from 1982 to 2006 that unconscionability challenges succeed with far greater frequency when the disputed term is an arbitration provision). This analysis strongly suggests an ingrained California bias against arbitration. In 47% of the cases where arbitration was involved, the agreement was found

(Continued on following page)

even more egregious where—as here—the contract itself provides for severance of unenforceable terms and provisions.

This discrimination will curtail access to arbitration. Most arbitration clauses today, in both standardized and non-standardized contracts, are broad and intended to cover all disputes, including statutory claims, that might arise between contracting parties. The majority of such clauses, including the arbitration clause in this case, explicitly incorporate AAA rules and procedures. The breadth of such clauses represents a conscious decision by parties to maximize the benefits of arbitration under an established ADR service provider. The Ninth Circuit's decision frustrates these efforts because severance of unenforceable contract provisions is greatly restricted when arbitration rights are involved. Any misstep in contract drafting threatens the parties' ability to enforce perfectly lawful parts of their dispute resolution agreements.

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unconscionable, as compared to 11% of cases addressing unconscionability as to a contract provision that did not relate to arbitration. In only 11% of the arbitration cases was the unconscionable provision severed. The sample involved 114 cases.

II. The Rules of the American Arbitration Association ("AAA") Provide A Due Process-Compliant Framework For Adjudication And An Effective Way To Address Unconscionable Contract Provisions

This Court has recognized, time and time again, the importance of providing parties with a fair forum in arbitration. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1911). Although certainly not a requirement of arbitration, when parties incorporate AAA rules—employment, labor, commercial, construction, international—there is a heightened judicial tendency to find the underlying arbitration process fair and due process-compliant. *Cole* v. *Burns Int'l Sec'y Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

A. AAA's Rules Can Remedy Any Potentially Serious Contractual Defects

In this case, the district court and the Ninth Circuit found flawed several provisions of the parties' contract. However, irrespective of whether these provisions are severed, AAA's Commercial Arbitration Rules serve as effective gap-fillers, to be used when needed to replace an unconscionable contract term or restore to the arbitral process even-handed treatment of the parties. If the Employment Arbitration and Mediation Rules of AAA apply, they would completely trump offending provisions in the parties' contract

and remove all traces of unconscionability. For example, Rule 1 of the Employment Rules provides:

> The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter "AAA") or under its *Employment Arbitration Rules and Mediation Procedures* or for arbitration by the AAA of an employment dispute without specifying particular rules.* *If a party establishes that an adverse material inconsistency exists between the arbitration agreement and these rules, the arbitrator shall apply these rules.*

American Arbitration Association, Employment Arbitration Rules & Mediation Procedures, Rule 1 (2009) (emphasis added); Brief of *Amici Curiae* ("BAC") App. 11.

Irrespective of whether the Commercial or Employment rules are applied to the contract here, AAA's procedures provide fairness to all parties. They mean that, if normal contract severance rules are applied, an even-handed and carefully-considered set of rules will govern. These rules can be applied to preserve the parties' agreement to arbitrate. A few examples are illustrative.

1. Six-Months Limitation Period

The courts below found unconscionable a provision that required plaintiffs to initiate arbitration

within six months of the time a claim or controversy arose. Pet. Appendix A-3a, 21a. In so concluding, the courts failed to consider that, whether or not the six month provision remains in effect, the AAA's Commercial and Employment Rules give the arbitrator the authority to decide whether or not a claim is timely filed. Commercial Arbitration Rule, R-7(a) (Jurisdiction) states: "The arbitrator *shall* have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." American Arbitration Association, Commercial Arbitration Rules & Mediation Procedures, Rule R-7 (2013) (emphasis added); BAC App. 1.[5]

This rule is consistent with the recognized principle that procedural issues are usually reserved for arbitrators to determine, not courts. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1995); *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (reaffirming the policy favoring the enforceability of arbitration clauses and holding that arbitrators must decide gateway procedural issues such as whether a claim is time-barred or has been waived).

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[5] Rule 6 (Jurisdiction) is the parallel provision in the Employment Arbitration and Mediation Rules of the American Arbitration Association, as amended and effective November, 2009.

The basic point is simple: whether the contract's six-month limitations provision is severed or not, the arbitrator is authorized under AAA rules to decide the timeliness of a claim. In assessing timeliness, the arbitrator could take into account any exigent circumstances, equitable considerations and factors like delayed discovery or continuing contract violations. The right of the claimant to obtain appropriate relief may remain intact despite the contract's six-month claim submission provision based on the operation of AAA rules.

2. Arbitrator Selection Process

The courts below found the arbitral selection process flawed because it placed the right of selection in the hands of *only* one party. Pet. Appendix A-3a, 22a. AAA rules rectify this imbalance by allowing each party an opportunity to participate in selecting the arbitrator. Under R-12 (Appointment From National Roster), the AAA prepares and submits a list of neutrals with subject matter experience. BAC App. 2. Each party is given ten days to rank their acceptable choices. From the lists returned to the AAA, the parties' mutual choice is invited to serve and adjudicate the case. In the event the parties cannot agree, the AAA will make the final appointment, subject to disqualification for cause. AAA makes every effort to ensure that the parties' mutual choice is ready, willing, and able to serve.

3. Cost And Fee Shifting Clause

The contract here awards fees and costs to the prevailing or "substantially prevailing" party. Pet. Appendix A-57a. According to the district court, this provision is objectionable because it could mean that even if the plaintiffs in arbitration prevailed on some of their claims, they may still be subject to absorbing defendants' attorneys' fees. Pet. Appendix A-25a.

If the court were to sever this provision, R-47 (Scope of Award) of AAA's Commercial Arbitration Rules would fill the gap. This rule gives the arbitrator the authority to grant any remedy or relief the arbitrator deems just and equitable and within the scope of the parties' agreement. Subsection (b) states that an arbitrator may assess and apportion the fees and expenses as the arbitrator determines appropriate.

4. Filing Fees And Punitive Damages

AAA's rules also address responsibility for payment of filing fees and the availability of punitive damages. Those AAA rules permit the arbitrator to decide exactly how such fees will be allocated and to set forth such amounts when rendering the final award. BAC App. 9.

With respect to punitive damages, R-47 (Scope of Award) clearly indicates that an arbitrator can render any award deemed just and equitable. This rule means an arbitrator could award punitive damages in

a case where the right to them is established. The provision in the parties' contract that precludes the arbitrator from making material errors of law is exactly the kind of provision that could confer on the arbitrator authority to award punitive damages if the evidence warranted them. Again, the AAA's Commercial Arbitration Rules would embed into the contract, as though the purportedly unconscionable provision were non-existent.

B. AAA's Rules Offer Other Significant Protections

The AAA is an industry standard arbitration provider in part because its arbitration rules incorporate extensive safeguards to ensure the neutrality and fairness of its processes. An illustrative sample of such rules includes:

- R-17 (Disclosure) (Protects the notion of *independent, impartial decision-making by creating* an *affirmative duty* to disclose conflicts of interest; the duty to disclose continues until the award is rendered). BAC App. 3.
- R-22 (Pre-Hearing Exchange and Production of Information) (Allows for ample exchange of information without compromising the economic and format efficiencies associated with the arbitral process). BAC App. 3-5.
- R-26 (Representation) (Assures the right of counsel). BAC App. 5.

- R-32 (Conduct of Proceedings) (Promotes full and expeditious presentation of the case by all parties). BAC App. 5-6.
- R-33 (Dispositive Motions) (Recognizes the growing complexity of arbitration by authorizing arbitrators, in appropriate cases, to hear and decide dispositive motions). BAC App. 6.
- R-34 (Evidence) (Allows the parties to offer such evidence as is relevant and material to the controversy and grants discretionary authority to the arbitrator to obtain additional evidence if necessary. The rule also permits the arbitrator, if authorized by law, to subpoena witnesses or documents). BAC App. 7.
- R-37 (Interim Measures) (Equalizes arbitration remedies with litigation remedies by explicitly authorizing an arbitrator to grant interim measures based on a showing of need. Such measures can include injunctive relief and measures for the protection or conservation of property). BAC App. 7-8.
- R-39 (Closing of Hearing) (Ensures that hearings are not officially closed until the arbitrator is satisfied that all evidence has been presented). BAC App. 8.
- R-40 (Reopening of Hearing) (Permits additional deliberations upon a showing of cause, before an award is rendered). BAC App. 9.

- R-50 (Modification of Award) (To further guard against adjudicative waste, this internal mechanism permits either party to request modification or clarification to correct "typographical errors or ministerial omissions or clarify the award to eliminate internal inconsistence or ambiguities"). BAC App. 10.

Each of these rules is independent. Each embraces a different aspect of the arbitral process. Deleting offensive clauses in the parties' arbitration agreement would leave in place the AAA's built-in procedures and protections that promote the just and efficient resolution of claims through arbitration.

CONCLUSION

The decision below constitutes a direct attack against arbitration. "Such generalized attacks on arbitration 'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,'" and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991), quoting *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (alteration in original).

AAA is a national and well-recognized non-profit ADR service provider. Under its rules, all parties derive the same benefits and burdens. Arbitration

offers many benefits, including efficiency, economy, and access to justice. The AAA's rules provide an even playing field for adjudication and are available when it is necessary to sever unconscionable contract provisions. The writ should issue to disapprove of California's rule denying equal treatment of arbitration under state law contract severance principles.

Respectfully submitted,

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Attorneys for Amici Curiae

APPENDIX A

Excerpts from American Arbitration Association, Commercial Arbitration Rules & Mediation Procedures (2013)

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-12. Appointment from National Roster

If the parties have not appointed an arbitrator and have not provided any other method of appointment,

the arbitrator shall be appointed in the following manner:

(a) The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.

(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 14 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable to that party. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.

(c) Unless the parties agree otherwise, when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators.

R-17. Disclosure

(a) Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-41.

(b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

(c) Disclosure of information pursuant to this Section R-17 is not an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-22. Pre-Hearing Exchange and Production of information

(a) *Authority of arbitrator.* The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at

the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.

(b) *Documents*. The arbitrator may, on application of a party or on the arbitrator's own initiative:

i. require the parties to exchange documents in their possession or custody on which they intend to rely;

ii. require the parties to update their exchanges of the documents on which they intend to rely as such documents become known to them;

iii. require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues; and

iv. require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form. The parties should attempt to agree in advance upon, and the arbitrator may determine, reasonable search parameters to

balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them.

R-26. Representation

Any party may participate without representation (*pro se*), or by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law. A party intending to be so represented shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-32. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

(c) When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, Internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination.

(d) The parties may agree to waive oral hearings in any case and may also agree to utilize the Procedures for Resolution of Disputes Through Document Submission, found in Rule E-6.

R.33. Dispositive Motions

The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.

R-34. Evidence

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

R.-37. Interim Measures

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.

(c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

R-39. Closing of Hearing

(a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.

(b) If documents or responses are to be filed as provided in Rule R-35, or if briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If no documents, responses, or briefs are to be filed, the arbitrator shall declare the hearings closed as of the date of the last hearing (including telephonic hearings). If the case was heard without any oral hearings, the arbitrator shall close the hearings upon the due date established for receipt of the final submission.

(c) The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing. The AAA may

extend the time limit for rendering of the award only in unusual and extreme circumstances.

R-40. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or by the direction of the arbitrator upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed to by the parties in the arbitration agreement, the matter may not be reopened unless the parties agree to an extension of time. When no specific date is fixed by agreement of the parties, the arbitrator shall have 30 calendar days from the closing of the reopened hearing within which to make an award (14 calendar days if the case is governed by the Expedited Procedures).

R-47. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees,

expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:

i. interest at such rate and from such date as the arbitrator(s) may deem appropriate; and

ii. an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-50. Modification of Award

Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

APPENDIX B

Excerpts from American Arbitration Association, Employment Arbitration Rules & Mediation Procedures (2009)

1. Applicable Rules of Arbitration

The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter "AAA") or under its Employment Arbitration Rules and Mediation Procedures or for arbitration by the AAA of an employment dispute without specifying particular rules*. If a party establishes that an adverse material inconsistency exists between the arbitration agreement and these rules, the arbitrator shall apply these rules.

If, within 30 days after the AAA's commencement of administration, a party seeks judicial intervention with respect to a pending arbitration and provides the AAA with documentation that judicial intervention has been sought, the AAA will suspend administration for 60 days to permit the party to obtain a stay of arbitration from the court. These rules, and any amendment of them, shall apply in the form in

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* The *National Rules for the Resolution of Employment Disputes* have been re-named the *Employment Arbitration Rules and Mediation Procedures*. Any arbitration agreements providing for arbitration under its *National Rules for the Resolution of Employment Disputes* shall be administered pursuant to these *Employment Arbitration Rules and Mediation Procedures*.

effect at the time the demand for arbitration or submission is received by the AAA.

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6. Jurisdiction

a. The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

b. The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

c. A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

RECORD
AND
BRIEFS

No. 14-1458

In the

Supreme Court of the United States

MHN GOVERNMENT SERVICES, INC., et al.,

Petitioners,

v.

THOMAS ZABOROWSKI, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Federal Arbitration Act ("FAA") provides that an arbitration agreement shall be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2. California law applies one rule of contract severability to contracts in general, and a separate rule of contract severability to agreements to arbitrate. The arbitration-only rule disfavors arbitration and applies even when the agreement contains an express severability clause. Its application in this case conflicts with binding precedent of this Court and with opinions of four other courts of appeals.

The question presented is whether California's arbitration-only severability rule is preempted by the FAA.

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Petitioner, MHN Government Services, Inc.[1] Founded in 1973, Pacific Legal Foundation (PLF) is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases in this Court, the California courts and many other state supreme courts involving the Federal Arbitration Act (FAA) and contractual arbitration in general. *See, e.g.*, *DIRECTV v. Imburgia*, No. 14-462 (pending); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Sanchez v. Valencia Holding Co.*, Cal. Supreme Ct. docket no. S199119; *Iskanian v. CLS*

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Transportation, 59 Cal. 4th 348 (2014), *cert. denied*, 135 S. Ct. 1155 (2015); *Gentry v. Superior Court (Circuit City Stores, Inc.)*, 42 Cal. 4th 443 (2007).

INTRODUCTION AND SUMMARY OF REASONS WHY THE PETITION SHOULD BE GRANTED

MHN Government Services, Inc. is a private company that runs a healthcare-consulting business and employs graduate-school-educated healthcare workers. Pet. App. 12a-13a. The employees claim they were misclassified as independent contractors rather than employees, and that they were consequently deprived of overtime pay in violation of federal and state laws. Pet. App. 13a. Despite their employment contracts' arbitration agreement, a putative class of employees sued the company in federal court. MHN moved to compel the workers to resolve their claims in arbitration. *Id.* The employees argued that multiple provisions of the agreement were unconscionable. The district court agreed with them as to five discrete provisions ancillary to the basic underlying agreement to arbitrate: a shortened 6-month limitations period; waiver of punitive damages; a $2600 filing fee; a fee-shifting clause that awards attorneys' fees to the prevailing party; and an arbitrator-selection clause that allowed the employer to unilaterally choose a pool of three arbitrators from which the employee could then select its choice of arbitrator. Pet. App. 20a-28a. Under the California Supreme Court decision in *Armendariz v. Found. Health Psychcare Svcs., Inc.*, 24 Cal. 4th 83, 124 (2000), if a court finds "more than one unlawful provision" in an arbitration agreement to be unconscionable, it will deny severance and refuse to enforce the agreement in its entirety. Applying this

principle, the Ninth Circuit Court of Appeals declined to sever the offensive provisions, and instead invalidated the entire agreement. Pet. App. 5a.

In the general contractual context, a court applying California law can withhold severance only if it finds, after a fact-intensive provision-by-provision analysis, that the unconscionable provisions truly permeate and infect the entirety of the contract. The court below applied the *Armendariz* severance rule: that a court should refuse to sever unconscionable provisions in an arbitration agreement, whether or not the offensive provisions permeate and infect the entirety of the contract. In so doing, it applies severance doctrine contrary to state statutes that permit severance of multiple discrete provisions, and disfavors arbitration agreements by facilitating invalidation of entire arbitration agreements. In *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. at 1747, this Court held that the FAA preempts state-law rules that treat arbitration agreements less favorably than other contracts, or even have a "disproportionate impact on arbitration agreements." Judge Gould correctly would have held the *Armendariz* severance rule preempted by the FAA under *Concepcion*, severed the offensive provisions, and held the parties to their contractual agreement to arbitrate. Pet. App. 8a, 11a.

The split decision below highlights the critical question of whether *Armendariz* was abrogated by the this Court's decision in *Concepcion*. *Armendariz*'s approach to severability of provisions in arbitration contracts is uniquely adverse compared to general state contract law of severability, in violation of the federal substantive law of arbitration and the Federal Arbitration Act, both of which require that arbitration

contracts be considered on an equal footing to all other contracts. By refusing to sever invalid provisions in favor of striking down arbitration contracts in their entirety, the Ninth Circuit, applying California law, defeats parties' legitimate expectations of arbitral resolution of disputes, thus harming the rule of law. For the reasons set forth below, the petition should be granted.

REASONS FOR GRANTING THE PETITION

I

THE *ARMENDARIZ* "NO-MORE-THAN-ONE" SEVERABILITY RULE DISFAVORS ARBITRATION CONTRACTS

California's general rule of contract law governing severability is that an invalid provision will be severed unless the invalidity "permeates" the entire contract, rendering it unlawful. Cal. Civ. Code § 1670.5 ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."); Cal. Civ. Code § 1599 ("Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest."). *See also Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119, 137 (1998) (relying on Section 1599 to sever invalid portions of lawyers' fee

agreement). In *Dotson v. Amgen, Inc.*, 181 Cal. App. 4th 975, 986 (2010), the California Court of Appeal held that "[a]lthough 'the statutes appear to give a trial court discretion as to whether to sever or restrict the unconscionable provision or whether to refuse to enforce the entire agreement[,] . . . it also appears to contemplate the latter course only when an agreement is '*permeated' by unconscionability*.'" (Emphasis added; citations omitted).

These statutes have been applied in such a way to invalidate the entirety of many arbitration contracts, however, instead of just the offending provisions. So long as an arbitration contract contains only a single unconscionable provision, California courts sever the offending provision and uphold the rest of the contract. But *Armendariz* established the rule that if more than one of these otherwise severable provisions exist in a single contract, unconscionability is deemed to permeate the agreement, rendering it fully invalid and unenforceable. 24 Cal. 4th at 124, cited in Pet. App. at 5a. The *Armendariz* court voiced the concern that it is not for the court to write the contract over for the parties. 24 Cal. 4th at 125. But "[p]artial enforcement [of a contract term] involves much less of a variation from the effects intended by the parties than total non-enforcement would." Arthur L. Corbin, *A Comment on* Beit v. Beit, 23 Conn. B.J. 43, 50 (1949), quoted in Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 Stan. L. Rev. 869, 893 (2011). Disregarding this policy, the *Armendariz* bright-line no-more-than-one rule stands as an obstacle to normal rules governing severance of invalid contract terms.

The key to *Armendariz*'s rule is its presumption that more than one invalid provision "permeates" an

arbitration contract. The "permeated" language is important, because it distinguishes between invalid provisions that can be lined out without altering the basic agreement between the parties and invalid provisions that infect every essential provision, such that lining them out fundamentally alters the contract. Yet none of the California arbitration cases actually define "permeate." However, in different contexts, courts have defined the term to mean "to be diffused throughout," *People v. Bautista*, 115 Cal. App. 4th 229, 236 n.4 (2004), and "cannot be discretely separate from . . . the whole." *In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management)*, 357 F.3d 900, 910 (9th Cir. 2004). These courts recognize that permeation does not depend on the size or quantity of the offending elements, but rather on the extent to which they affect every other aspect of the whole.

The *Armendariz* decision reflects the court's hostility to arbitration by presuming that more than one unconscionable provision *per se* permeates the entire agreement, requiring that the agreement be invalidated in its entirety. 24 Cal. 4th at 124. The no-more-than-one rule, while permitting severance of a single, discrete invalid provision, offers no logical justification (beyond the presumption of permeation) for refusing to sever two, three, or more provisions, if the subject matter of those provisions are also sufficiently discrete from the primary subject of the contract. *See Spinetti v. Service Corp. Intern.*, 324 F.3d 212, 214 (3d Cir. 2003) (severing multiple provisions to uphold an arbitration contract, noting "You don't cut down the trunk of a tree because some of its branches are sickly.").

As the law of arbitration has evolved, many types of provisions have been held unconscionable and severed, so long as no more than one provision is unconscionable. For example, an attorneys' fee shifting provision was held unconscionable and severed from the contract. *See, e.g., Serpa v. California Surety Investigations, Inc.*, 215 Cal. App. 4th 695, 710 (2013) (offending attorney fee provision severed as "plainly collateral to the main purpose of the contract" and remainder of arbitration agreement enforced). Costs provisions have been held unconscionable and severed from the contract. *See, e.g., Gutierrez v. Autowest, Inc.*, 114 Cal. App. 4th 77, 92 (2003) (severing costs provision and enforcing the balance of the arbitration agreement; the central purpose of the contract "was not to regulate costs, but to provide a mechanism to resolve disputes [and] [b]ecause the costs provision is collateral to that purpose, severance was available."). Unilateral appeal provisions have been held unconscionable and severed from the contract. *See, e.g., Little v. Auto Steigler, Inc.*, 29 Cal. 4th 1064, 1075-76 (2003). A provision limiting discovery may be held unconscionable and severed from an otherwise valid arbitration contract. *See, e.g., Dotson*, 181 Cal. App. 4th at 985. There is no logical reason why each of these provisions is described as discrete and collateral to the main objective of the contract in isolation, but the same provisions are suddenly deemed to permeate every aspect of a contract in combination.

Not all federal courts, applying California law, uncritically accept the *Armendariz* no-more-the-one rule. Several district court decisions assess whether the unconscionable provisions are, in fact, central to the arbitration contract and permeate all facets. If discrete provisions can be severed without harming the

parties' general intent to resolve disputes in arbitration, the courts sever those provisions. For example, in *Lucas v. Gund*, 450 F. Supp. 2d 1125, 1134 (C.D. Cal. 2006), the district court cited *Armendariz* but relied on the language of Cal. Civil Code § 1670.5 to sever two discrete, unconscionable provisions (one involving costs and fees; the other mandating New Jersey as the location for the arbitration).[2] Similarly, a district court severed three provisions—relating to carve-outs for injunctive and equitable relief, confidentiality, and attorneys' fees—and upheld an otherwise valid arbitration agreement. *Grabowski v. Robinson*, 817 F. Supp. 2d 1159, 1179 (S.D. Cal. 2011) (arbitration agreement was not "permeated by unconscionability," notwithstanding the three discrete, unconscionable provisions). *See also Hwang v. J.P Morgan Chase Bank, N.A.*, No. CV 11-10782 PSG (JEMx), 2012 WL 3862338 (C.D. Cal. Aug. 16, 2012) (severed invalid fee-sharing and modification provisions because they were "collateral to the agreements" and "would not amount to rewriting the agreements."); *Bencharsky v. Cottman Transmission Systems, LLC*, 625 F. Supp. 2d 872, 883 (N.D. Cal. 2008) (severing multiple provisions limiting the statute

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[2] One California Court of Appeal decision, issued just six months after *Armendariz*, before the anti-arbitration severance rule was firmly established, focused on the severance statute and never mentioned the *Armendariz* no-more-than-one rule. In *Bolter v. Superior Court*, 87 Cal. App. 4th 900, 910-11 (2001), the court severed three unconscionable provisions from an arbitration contract related to a franchise agreement (prohibiting consolidation, limiting damages, and mandating Utah as the forum), finding no reason "to throw the baby out with the bath water" because "[u]nconscionability can be cured by striking those provisions, leaving an otherwise valid and complete agreement to submit disputes to arbitration. *Id.*

of limitations, barring punitive damages, and awarding equitable relief to only one party, while upholding the remainder of the arbitration agreement). These cases demonstrate an ongoing conflict between those California and federal cases that rely on *Armendariz*'s no-more-than-one severance rule, and those that place greater reliance on the language of the California statutes that authorize severance.

This Court's review of this case will impact several cases currently pending in the California courts. For example, in *Trabert v. Consumer Portfolio Services, Inc.*, 234 Cal. App. 4th 1154, 184 Cal. Rptr. 3d 596, 598 (2015), the California Court of Appeal held that unconscionable provisions in an arbitration contract *could* be severed "without affecting the core purpose and intent" of the agreement, thereby promoting "the fundamental attributes of arbitration, including speed, efficiency, and lower costs." However, the California Supreme Court granted the plaintiff's petition for review, 2015 WL 3623587 (Cal. Jun. 10, 2015), vacating the lower court decision and rendering it non-citeable in California courts. Cal. R. Ct. 8.1115; *McMahon v. City of Los Angeles*, 172 Cal. App. 4th 1324, 1336 n.10 (2009). Briefing is deferred pending resolution of *Sanchez v. Valencia Holding Co.*, Cal. Supreme Ct. docket no. S199119. *See also Park v. CTBC Bank Corp.*, No. B255809, 2015 WL 799541, *11 (Cal. Ct. App. Feb. 25, 2015) (unpublished) (invalidating an entire contract because it contained two unlawful provisions, a carve-out provision and a Private Attorney General Act claim waiver).

Armendariz's no-more-than-one severability rule has been in place for 15 years, resulting in invalidation of countless otherwise valid arbitration contracts. The

issue has generated the conflicts among the federal Circuits described in the petition in this case, as well as the differing approaches between California state courts and federal district courts within California. This Court should grant the petition to address this doctrine that undermines the freedom to contract for arbitral resolution of disputes.

II

CALIFORNIA'S DEFIANCE OF FEDERAL ARBITRATION LAW INFECTS CONTRACTS NATIONWIDE AND UNDERMINES THE RULE OF LAW

Although, as noted above, federal district courts in California are sometimes willing to apply the Federal Arbitration Act and federal substantive law of arbitration over contrary California caselaw, the Ninth Circuit has too frequently shown itself a willing propagator of California's anti-arbitration doctrines. *See, e.g.*, *Concepcion*, 131 S. Ct. at 1753 (reversing Ninth Circuit application of California's *Discover Bank* anti-class action waiver rule); *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1082 (9th Cir. 2007) (applying California's *Broughton-Cruz* doctrine, which forbids arbitration of claims seeking public injunctive relief).[3] The Ninth Circuit applies California anti-arbitration doctrine even as it has forthrightly acknowledged that

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[3] The Ninth Circuit subsequently acknowledged that *Concepcion* marked the end of the *Broughton-Cruz* doctrine. *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 933-34 (9th Cir. 2013) (holding that *Concepcion* overruled *Davis*). The California Supreme Court has not yet made the same acknowledgment. *But see McGill v. Citibank*, 232 Cal. App. 4th 753 (2014), *review granted*, 185 Cal. Rptr. 3d 430 (2015) (question presented whether *Broughton-Cruz* survives *Concepcion*).

California law disfavors arbitration contracts, as compared to the law of other states. *See Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1003-05 (9th Cir. 2010) (citing *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 301 n.5 (5th Cir. 2004) (noting that California law is more hostile than Texas law to arbitration agreements, and the application of one law instead of the other is often determinative on the question of the enforceability of the agreement and then applying California law to determine that the arbitration contract was unconscionable).

The problem is not limited to California and the Ninth Circuit. California's hostility to arbitration has considerable potential to influence other states. As a center of economic trade, contracts across the country often provide that California law controls. *See, e.g., Triad Sys. Fin. Corp. v. Stewart's Auto Supply, Inc.*, 47 F. Supp. 2d 1332, 1334 (N.D. Ala. 1999) (Alabama residents bound by contract that made California law controlling); *Sec. Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 323 (2d Cir. 2004) (upholding reinsurance agreement that designated California law as controlling); *Naegele v. Albers*, 940 F. Supp. 2d 1, 8-9 (D.D.C. 2013) (relying on California arbitration law and staying federal proceedings); *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 605 (E.D. Penn. 2007) (applying California unconscionability law, particularly *Armendariz*, to strike down an arbitration agreement); *Phillips Petroleum Co. v. Arco Alaska, Inc.*, No. 7177, 1986 WL 7612, at *6-7 (Del. Ch. July 9, 1986) (parties to oil and gas leases in Prudhoe Bay, Alaska, agreed that California law controlled their arbitration contract).

The Supreme Court of the Territory of Guam, in *Pangelinan v. Camacho*, 2008 Guam 4, 2008 WL 686242, relied on *Armendariz*'s presumption of permeation to invalidate an entire 281-page contract because of a single unconscionable provision. Presiding Justice Pro Tempore Benson, concurring and dissenting, expressly noted the conflict between the *Armendariz* approach, expansively adopted by the majority opinion, and *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 681-82 (8th Cir. 2001), which severed a similar, unconscionable damages clause to preserve the rest of the contract. *See also* Pet. at 20-21 (describing *Gannon* and other courts in conflict with *Armendariz*'s restrictive severance rule).

This Court should address the consequences of California's widespread defiance, enabled and expanded by the Ninth Circuit. "[S]tate judicial noncompliance sanctions lawlessness. Defiance of this breed undermines the rule of law and reduces faith in the legal order, which could lead to more general kinds of illegality." Salvatore U. Bonaccorso, Note, *State Court Resistance to Federal Arbitration Law*, 67 Stan. L. Rev. 1145, 1169 (2015). If this Court does not rein in California's obstinate disregard of federal law, the federal substantive law of arbitration, as well as the Federal Arbitration Act, will suffer drastic changes from one state to the next. When some states comply with the Court's rulings, and others do not, the people ostensibly governed by the law cannot reliably predict judicial outcomes, an especially critical concern in contract interpretation. Bonaccorso, *supra*, at 1170. This then hampers one of the law's main purposes—to influence people's future behavior. *See Church of Scientology of California v. IRS*, 792 F.2d 153, 155 n.1 (D.C. Cir. 1986) (secondary appellate review is best

reserved for "the establishment of legal rules for future guidance"), *aff'd*, 484 U.S. 9 (1987). Moreover, the cost to defend the enforceability of an arbitration agreement in a court hostile to arbitration discourages the use of arbitration, contrary to the purpose of the Federal Arbitration Act. *See* Imre S. Szalai, *Modern Arbitration Values and the First World War*, 49 Am. J. Legal Hist. 355, 355 (2007).

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: July, 2015.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MHN GOVERNMENT SERVICES, INC., AND MANAGED HEALTH NETWORK, INC.,

Petitioners,

v.

THOMAS ZABOROWSKI, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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United States Court of Appeals for the Ninth Circuit

THOMAS ZABOROWSKI; VANESSA BALDINI; KIM DALE; NANCY PADDOCK; MARIA HOWARD; TIM PLATT, on behalf of themselves and all others similarly situated,

Plaintiffs - Appellees,

v.

MHN GOVERNMENT SERVICES, INC.; MANAGED HEALTH NETWORK, INC.,

Defendants - Appellants.

Court of Appeals Docket #:
13-15671
Nature of Suit:
3710 Fair Labor Standards Act
Thomas Zaborowski, et al v. MHN Government Svcs, et al
Appeal From:
U.S. District Court for Northern California, San Francisco

Docketed: 04/09/2013
Termed: 12/17/2014
Fee Status: Paid

Date	No.	Proceedings
08/16/2013	10	Submitted (ECF) Opening Brief and excerpts of record for review. Submitted by Appellants MHN Government Services, Inc. and Managed Health Network, Inc. Date of service: 08/16/2013. [8746710] (TJL) [Entered: 08/16/2013 03:59 PM]
08/21/2013	15	Filed Appellants MHN Government Services, Inc. and Managed Health Network, Inc. paper copies of excerpts of record [10] in 3 volume(s). [8753628] (GV) [Entered: 08/22/2013 07:41 PM]
09/13/2013	19	Filed (ECF) Appellees Vanessa Baldini, Kim Dale, Maria Howard, Nancy Paddock, Tim Platt and Thomas Zaborowski Motion to dismiss the case. Date of service: 09/13/2013. [8782534] (JCS) [Entered: 09/13/2013 10:29 PM]
10/03/2013	22	Filed (ECF) Appellants MHN Government Services, Inc. and Managed Health Network, Inc. response

		opposing motion (motion to dismiss the case). Date of service: 10/03/2013. [8808944] (TJL) [Entered: 10/03/2013 04:44 PM]
10/11/2013	23	Filed (ECF) Appellees Vanessa Baldini, Kim Dale, Maria Howard, Nancy Paddock, Tim Platt and Thomas Zaborowski reply to response (motion to dismiss the case). Date of service: 10/11/2013. [8818988] (ARV) [Entered: 10/11/2013 01:08 PM]
03/18/2014	27	Filed order (Appellate Commissioner): Appellees' motion to dismiss this appeal based on collateral estoppel is denied without prejudice to renewing the arguments in the answering brief. Cf. Nat'l Indus. v. Republic Nat'l Life Ins. Co., 677 F.2d 1258, 1262 (9th Cir. 1982) (stating that merits panel may consider appellate jurisdiction despite earlier denial of motion to dismiss). The opening brief has been filed. The answering brief is due 30 days after the filing date of this order; and the optional reply brief is due

		within 14 days after service of the answering brief. (MOATT) [9019565] (WL) [Entered: 03/18/2014 06:55 AM]
04/17/2014	28	Submitted (ECF) Answering Brief and supplemental excerpts of record for review. Submitted by Appellees Vanessa Baldini, Kim Dale, Maria Howard, Nancy Paddock, Tim Platt and Thomas Zaborowski. Date of service: 04/17/2014. [9062797] (JCS) [Entered: 04/17/2014 04:07 PM]
04/23/2014	32	Filed Appellees' paper copies of supplemental excerpts of record [28] in 1 volume. [9071898] (TH) [Entered: 04/24/2014 04:55 PM]
05/30/2014	34	Submitted (ECF) Reply Brief for review. Submitted by Appellants MHN Government Services, Inc. and Managed Health Network, Inc. Date of service: 05/30/2014. [9115235] (TJL) [Entered: 05/30/2014 04:59 PM]
11/03/2014	40	Filed (ECF) Appellants Managed Health Network, Inc. and MHN Government Services, Inc. citation of

		supplemental authorities. Date of service: 11/03/2014. [9300067] [13-15671] (TJL) [Entered: 11/03/2014 04:13 PM]
11/13/2014	43	Filed (ECF) Appellees Vanessa Baldini, Kim Dale, Maria Howard, Nancy Paddock, Tim Platt and Thomas Zaborowski citation of supplemental authorities. Date of service: 11/13/2014. [9311944] [13-15671] (JCS) [Entered: 11/13/2014 01:36 PM]
11/14/2014	44	Filed (ECF) Appellants Managed Health Network, Inc. and MHN Government Services, Inc. citation of supplemental authorities. Date of service: 11/14/2014. [9312635] [13-15671] (TJL) [Entered: 11/14/2014 03:47 AM]
11/18/2014	45	ARGUED AND SUBMITTED TO RONALD M. GOULD, PAUL J. WATFORD and RICARDO S. MARTINEZ. [9317127] (HH) [Entered: 11/18/2014 11:48 AM]
12/17/2014	46	FILED MEMORANDUM DISPOSITION (RONALD M.

		GOULD, PAUL J. WATFORD and RICARDO S. MARTINEZ) AFFIRMED. FILED AND ENTERED JUDGMENT. [9352462] (MM) [Entered: 12/17/2014 09:10 AM]
01/14/2015	49	Filed (ECF) Appellants Managed Health Network, Inc. and MHN Government Services, Inc. petition for rehearing en banc (from 12/17/2014 memorandum). Date of service: 01/14/2015. [9382466] [13-15671] (TJL) [Entered: 01/14/2015 01:46 PM]
02/09/2015	50	Filed order (RONALD M. GOULD, PAUL J. WATFORD and RICARDO S. MARTINEZ) Judge Gould votes to grant the petition for rehearing en banc. Judge Watford votes to deny the petition for rehearing en banc, and Judge Martinez so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for

		rehearing en banc, filed January 14, 2015, is DENIED. [9414225] (SM) [Entered: 02/09/2015 11:51 AM]
02/13/2015	51	Filed (ECF) Appellants Managed Health Network, Inc. and MHN Government Services, Inc. Motion to stay the mandate. Date of service: 02/13/2015. [9421428] [13-15671] (TJL) [Entered: 02/13/2015 01:48 PM]
02/13/2015	52	Filed order (RONALD M. GOULD, PAUL J. WATFORD and RICARDO S. MARTINEZ) Appellants' motion to stay the mandate is GRANTED. The mandate is stayed for a period of ninety days from the date of this order. If Appellants file a petition for writ of certiorari in the United States Supreme Court during the period of the stay, the stay shall continue until final disposition by the Supreme Court. See Fed. R. App. P. 41. [9421977] (SM) [Entered: 02/13/2015 04:48 PM]
06/16/2015	54	Received notice from the Supreme Court: petition for certiorari filed on 06/10/2015.

		Supreme Court Number 14-1458. [9577066] (RR) [Entered: 06/16/2015 05:12 PM]
10/01/2015	55	Received notice from the Supreme Court. Petition for certiorari GRANTED on 10/01/2015. Supreme Court Number 14-1458. [9704728] (RR) [Entered: 10/01/2015 07:00 PM]

U.S. District Court
California Northern District (San Francisco)
CIVIL DOCKET FOR CASE #: 3:12-cv-05109-S

Zaborowski et al v. MHN Government Services, Inc. et al		Date Filed: 10/02/2012
Assigned to: Hon. Susan Illston		Jury Demand: Plaintiff
Relate Case Cases:	3:13-cv-03016-SI	Nature of Suit: 710 Labor: Fair Standards
	3:14-cv-01449-SI	Jurisdiction: Federal Question
Case in other court: USCA, 13-15671		

Cause: 29:201 Fair Labor Standards Act

Date Filed	#	Docket Text
10/02/2012	1	CLASS ACTION COMPLAINT; Jury Trial Demanded against MHN Government Services, Inc., Managed Health Network, Inc. (Filing fee $350.00, receipt number 34611079242). Filed by Thomas Zaborowski, Vanessa Baldini. (Attachments: #1 Civil Cover Sheet) (gba, COURT STAFF) (Filed on 10/2/2012) (Entered: 10/02/2012)

11/01/2012	15	MOTION to Compel Arbitration and Stay Proceedings Pending Arbitration filed by MHN Government Services, Inc., Managed Health Network, Inc. Motion Hearing set for 12/7/2012 09:00 AM in Courtroom 10, 19th Floor, San Francisco before Hon. Susan Illston. Responses due by 11/15/2012. Replies due by 11/26/2012. (Attachments: #1 Declaration of Dena Maddox In Support of Motion to Compel Arbitration, #2 Exhibit A through D to Declaration of Dena Maddox, #3 Proposed Order Granting Motion to Compel Arbitration) (Long, Timothy) (Filed on 11/1/2012) (Entered: 11/01/2012)
12/21/2012	29	RESPONSE (re 15 MOTION to Compel Arbitration and Stay Proceedings Pending Arbitration) filed by Vanessa Baldini, Thomas Zaborowski. (Attachments: #1 Declaration Thomas Zaborowski, #2 Exhibit A Zaborowski Declaration, #3 Exhibit B Zaborowski Declaration, #4 Exhibit C Zaborowski Declaration, #5 Exhibit D Zaborowski Declaration, #6 Exhibit E Zaborowski Declaration, #7 Exhibit F Zaborowski Declaration, #8 Exhibit G Zaborowski Declaration, #9 Exhibit H Zabo-

		rowski Declaration, #10 Declaration Vanessa Baldini, #11 Proposed Order Proposed Order) (Vaught, Allen) (Filed on 12/21/2012) (Entered: 12/21/2012)
01/11/2013	31	REPLY (re 15 MOTION to Compel Arbitration and Stay Proceedings Pending Arbitration) filed by MHN Government Services, Inc., Managed Health Network, Inc. (Damrell, Lauri) (Filed on 1/11/2013) (Entered: 01/11/2013)
02/08/2013	40	AMENDED COMPLAINT FIRST AMENDED COMPLAINT FOR VIOLATIONS OF FLSA AND STATE WAGE AND HOUR LAWS against MHN Government Services, Inc., Managed Health Network, Inc. Filed by Thomas Zaborowski, Vanessa Baldini. (Attachments: #1 Exhibit A, #2 Exhibit B) (Sagafi, Jahan) (Filed on 2/8/2013) (Entered: 02/08/2013)
02/15/2013	42	RESPONSE (re 15 MOTION to Compel Arbitration and Stay Proceedings Pending Arbitration) Plaintiffs' Supplemental Brief in Opposition to MHN's Motion to Compel Arbitration filed by Vanessa Baldini, Kim Dale,

		Nancy Paddock, Thomas Zaborowski. (Sagafi, Jahan) (Filed on 2/15/2013) (Entered: 02/15/2013)
03/01/2013	48	Supplemental Brief re 15 MOTION to Compel Arbitration and Stay Proceedings Pending Arbitration filed by MHN Government Services, Inc., Managed Health Network, Inc. (Attachments: #1 Declaration of John Crocker ISO Dfts' Supplemental Reply, #2 Exhibit A to Declaration of John Crocker, #3 Exhibit B to Declaration of John Crocker) (Related document(s) 15) (Long, Timothy) (Filed on 3/1/2013) (Entered: 03/01/2013)
03/14/2013	54	MOTION to Certify Class Plaintiff's Notice of Motion and Motion for Motion for Conditional FLSA Collective Action Certification and Issuance of Notice filed by Vanessa Baldini, Kim Dale, Nancy Paddock, Thomas Zaborowski, Maria Howard, Tim Platt. Motion Hearing set for 4/19/2013 09:00 AM in Courtroom 10, 19th Floor, San Francisco before Hon. Susan Illston. Responses due by 3/28/2013. Replies due by

		4/4/2013. (Sagafi, Jahan) (Filed on 3/14/2013) (Entered: 03/14/2013)
04/03/2013	68	ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION 59 60 65 15 (Illston, Susan) (Filed on 4/3/2013) (Entered: 04/03/2013)
04/05/2013	70	RESPONSE (re 54 MOTION to Certify Class Plaintiff's Notice of Motion and Motion for Motion for Conditional FLSA Collective Action Certification and Issuance of Notice) filed by MHN Government Services, Inc., Managed Health Network, Inc. (Attachments: #1 Objections to Evidence In Support of Opposition to Plaintiffs' Motion for Conditional FLSA Collective Action Certification and Issuance of Notice, #2 Declaration of Tim Long ISO Defendant' Opposition with Exhibits A-D, #3 Exhibit E to Declaration of Tim Long ISO Opposition, #4 Declaration of Maddox ISO Opposition, #5 Declaration of Robinson ISO Opposition, #6 Declaration of Steelman ISO Opposition, #7 Declaration of Miller ISO Opposition, #8 Request for Judicial Notice ISO Opposition)

		(Long, Timothy) (Filed on 4/5/2013) (Entered: 04/05/2013)
04/08/2013	71	NOTICE OF APPEAL to the 9th CCA 13-15671 MHN Government Services, Inc., Managed Health Network, Inc. (Appeal fee of $455 receipt number 0971-7611709 paid.) (Attachments: # 1 Exhibit A) (Long, Timothy) (Filed on 4/8/2013) (Entered: 04/08/2013)
04/09/2013	73	USCA Case Number 13-15671 USCA for 71 Notice of Appeal filed by Managed Health Network, Inc., MHN Government Services, Inc. (ysS, COURT STAFF) (Filed on 4/9/2013) (Entered: 04/10/2013)
04/12/2013	74	NOTICE by Vanessa Baldini, Kim Dale, Nancy Paddock, Thomas Zaborowski of Filing of Consent to Join Form (Sagafi, Jahan) (Filed on 4/12/2013) (Entered: 04/12/2013)
04/12/2013	76	REPLY (re 54 MOTION to Certify Class Plaintiff's Notice of Motion and Motion for Motion for Conditional FLSA Collective Action Certification and Issuance of Notice) filed by Vanessa Baldini, Kim Dale, Maria Howard, Nancy Paddock, Tim

		Platt, Thomas Zaborowski. (Attachments: #1 Declaration Sagafi, #2 Declaration - Peter, #3 Declaration - Hennis, #4 Declaration - Platt, #5 Declaration – Zaborowski)(Sagafi, Jahan) (Filed on 4/12/2013) (Entered: 04/12/2013)
04/25/2013	80	ORDER GRANTING PLAINTIFFS' MOTION FOR CONDITIONAL FLSA COLLECTIVE ACTION CERTIFICATION re 54. Parties proposed notice is due May 3, 2013. Defendants to produce info by 5/17/13. (Illston, Susan) (Filed on 4/25/2013) Modified on 4/26/2013 (ysS, COURT STAFF). (Entered: 04/25/2013)
04/26/2013	82	Transcript of Proceedings held on March 15, 2013, before Judge Susan Illston. Court Reporter/ Transcriber Joan Marie Columbini, CSR, RPR, Telephone number 415-255-6842. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that

		date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. Release of Transcript Restriction set for 7/25/2013. (Related documents(s) 78) (Columbini, Joan) (Filed on 4/26/2013) (Entered: 04/26/2013)
01/31/2014	169	Second AMENDED COMPLAINT against All Defendants. Filed by Kim Dale, Thomas Zaborowski, Nancy Paddock, Tim Platt, Maria Howard, Vanessa Baldini. (Attachments: #1 Exhibit A) (Vaught, Allen) (Filed on 1/31/2014) Modified on 2/3/2014 (ysS, COURT STAFF). (Entered: 01/31/2014)
01/13/2015	180	ORDER previously filed to be spread to all related cases. *ORDER GRANTING DEFENDANTS' MOTION TO STAY CASE PENDING APPEAL AND DENYING ALTERNATIVE MOTION TO DISMISS AND MOTION TO COMPEL, WITHOUT PREJUDICE TO RENEWAL AFTER STAY IS LIFTED (Illston, Susan) (Filed on 6/3/2014) (Entered: 06/03/2014). Signed by Judge Susan Illston on 6/3/14. (tfS, COURT STAFF)

(Filed on 1/13/2015) (Entered: 01/13/2015)

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

THOMAS ZABOROWSKI, VANESSA BALDINI, KIM DALE NANCY PADDOCK, MARIA HOWARD, and TIM PLATT, on behalf of themselves, and all others similarly situated, Plaintiffs, v. MHN GOVERNMENT SERVICES, INC. and MANAGED HEALTH NETWORK, INC., Defendants.	Case No. 12-CV-05109-SI **SECOND AMENDED COMPLAINT FOR VIOLATIONS OF FLSA AND STATE WAGE AND HOUR LAWS** **COLLECTIVE ACTION** **CLASS ACTION** **DEMAND FOR JURY TRIAL**

Plaintiffs Thomas Zaborowski, Vanessa Baldini, Kim Dale, Nancy Paddock, Maria Howard, and Tim Platt (collectively, 'Plaintiffs') allege, on behalf of themselves and classes of those similarly situated, as follows:

JURISDICTION AND VENUE

1. This Court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331 and section 16(b) of the Fair Labor Standards Act ('FLSA'), 29 U.S.C. § 216(b).

2. Furthermore, this Court has federal question jurisdiction over Plaintiffs' declaratory judgment action brought pursuant to 28 U.S.C. § 2201. Plaintiffs' declaratory judgment action involves adjudication of federal issues, because the arbitration agreement at issue seeks to impair, and has the practical effect of impairing, the MFLCs' substantive and procedural rights under the FLSA.

3. This Court also has original jurisdiction over this action under the Class Action Fairness Act, 28 U.S.C. § 1332(d), because this is a class action in which: (1) there are 100 or more members in the proposed class; (2) at least some members of the proposed class have a different citizenship from Defendant; and (3) the claims of the proposed class members exceed $5,000,000 in the aggregate.

4. In addition, this Court has supplemental jurisdiction under 28 U.S.C. § 1367 over Plaintiff's state wage and hour law claims because those claims derive from a common nucleus of operative fact.

5. This Court is empowered to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

6. The United States District Court for the Northern District of California has personal jurisdiction over MHN Government Services, Inc. ('MHNGS') and Managed Health Network, Inc. ('MHN, Inc.') (collectively, 'MHN' or 'Defendants'), because both MHN entities are headquartered in this District, do business in California and in this District, and because many of the acts complained of and giving rise to the claims alleged occurred in and emanated from this District.

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claims occurred in this District.

8. Intradistrict assignment: Pursuant to N.D. Cal. Local Rule 3-2(c) and (e), intradistrict assignment to the San Francisco Division is proper because a substantial part of the events that give rise to the claims asserted occurred in Marin County.

SUMMARY OF CLAIMS

9. Plaintiffs performed work for MHN as Military and Family Life Consultants ('MFLCs') while classified by MHN as independent contractors. MFLCs have the primary duty of serving as routers of information for servicemembers at the military bases to which they are assigned. (MHN contracts with the federal government to provide health care services to servicemembers at those bases.)

10. MHN has unlawfully classified all MFLCs nationwide as independent contractors, despite the fact that they should have been classified as nonexempt employees. The MFLCs satisfied all applicable legal tests for employment status. In addition, MHN cannot bear its burden of showing that MFLCs fit within one of the narrow exemptions to the FLSA or applicable state wage and hour law. Therefore, the MFLCs are entitled to overtime pay for all overtime hours worked, as well as additional remedies available under applicable law.

11. MHN has willfully refused to pay the MFLCs the required overtime compensation for overtime hours worked, and has failed to keep legally required time records.

12. MHN's practices violate the FLSA and the state laws pled herein. Plaintiffs seek declaratory relief; overtime compensation for all overtime work required, suffered, or permitted by MHN; liquidated and/or other damages and penalties as permitted by applicable law; benefits recoverable under applicable law and interest; and attorneys' fees and costs. Plaintiffs also seek declaratory relief regarding the unconscionability and inapplicability of MHN's arbitration agreement.

13. On information and belief, since the filing of the initial complaint in this action, MHN has reclassified or is in the process of reclassifying all MFLCs from independent contractor status to employee status.

SUMMARY OF COLLECTIVE AND CLASS ACTION ALLEGATIONS

14. Plaintiffs bring this action on behalf of themselves and all persons who have worked for MHN in any location covered by the FLSA[1] as MFLCs (the 'Class Positions'), at any time within the three years prior to the filing of the initial Compıaint through the date of the final disposition of this action (the 'Nationwide FLSA Period'). This group is hereinafter referred to as the 'Nationwide FLSA Plaintiffs.'

15. Plaintiff Vanessa Baldini ('the California Named Plaintiff') also bring this action on behalf of all persons who have worked for MHN in California in the Class Positions ('the California Class'), at any time within the four years prior to the date of the filing of the First Amended Complaint through the date of the final disposition of this action (the 'California Class Period').

16. Plaintiff Nancy Paddock ('the Hawaii Named Plaintiff') also brings this action on behalf of all persons who have worked for MHN in Hawaii in the Class Positions ('the Hawaii Class'), at any time within the six years prior to the date of the filing of the First Amended Complaint through the date of the final disposition of this action (the 'Hawaii Class Period').

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[1] The FLSA covers work performed in the fifty states, Washington, D.C., Guam, and other locations. 29 U.S.C. § 213(f).

17. Plaintiffs Kim Dale and Nancy Paddock ('the Kentucky Named Plaintiffs') also bring this action on behalf of all persons who have worked for MHN in Kentucky in the Class Positions ('the Kentucky Class'), at any time within the five years prior to the date of the filing of the First Amended Complaint through the date of the final disposition of this action (the 'Kentucky Class Period').

18. Plaintiff Thomas Zaborowski ('the Nevada Named Plaintiff') also brings this action on behalf of all persons who have worked for MHN in Nevada in the Class Positions ('the Nevada Class'), at any time within the two years prior to the date of the filing of the First Amended Complaint through the date of the final disposition of this action (the 'Nevada Class Period').

19. Plaintiff Tim Platt ('the New Mexico Named Plaintiff') also brings this action on behalf of all persons who have worked for MHN in New Mexico in the Class Positions ('the New Mexico Class'), at any time within the one year prior to the date of the filing of this Second Amended Complaint through the date of the final disposition of this action (the 'New Mexico Class Period').

20. Plaintiffs Maria Howard and Tim Platt ('the New York Named Plaintiffs') also bring this action on behalf of all persons who have worked for MHN in New York in the Class Positions ('the New York Class'), at any time within the six years prior to the date of the filing of this Second Amended Complaint through the date of the final disposition of this action (the 'New York Class Period').

21. Plaintiff Maria Howard ('the North Carolina Named Plaintiff') also brings this action on behalf of all persons who have worked for MHN in North Carolina in the Class Positions ('the North Carolina Class'), at any time within the two years prior to the date of the filing of this Second Amended Complaint through the date of the final disposition of this action (the 'North Carolina Class Period').

22. The California, Hawaii, Kentucky, Nevada, New Mexico, New York, and North Carolina Classes are hereinafter referred to as the 'State Law Classes.'

THE PARTIES

I. Plaintiffs

A. Thomas Zaborowski

23. Plaintiff Thomas Zaborowski has worked for MHN as an MFLC from approximately November 2010 to September 2012.

24. Specifically, he has worked for MHN as an MFLC during the following time periods:

a. From November 2010 to November 2011, he worked in Fort Riley, Kansas.

b. From February to May 2012, he worked at Nellis Air Force Base, Nevada.

c. From June to September 2012, he worked at Creech Air Force Base, Nevada.

25. Mr. Zaborowski consents to sue for violations of the FLSA, pursuant to 29 U.S.C. §§ 216(b) and 256. His consent to join form was attached to the First Amended Complaint.

B. Vanessa Baldini

26. Plaintiff Vanessa Baldini has worked for MHN as an MFLC from approximately May 2009 to the present.

27. Specifically, she has worked for MHN as an MFLC during the following time periods:

a. From approximately May to June 2009, she worked in Kileen, Texas.

b. From approximately June 2009 to September 2009, she worked in Yorktown, Virginia.

c. From approximately October 2009 to January 2010, she worked in Las Vegas, Nevada.

d. From approximately April to May 2010, she worked in Leemore, California.

e. From approximately October 2010 to April 2011, she worked in Fort Riley, Kansas.

f. At other times during the period May 2009 to June 2011, she worked overseas.

g. From June 2011 to the present, she has remained active in MHN's system, but has not performed work for MHN.

28. Ms. Baldini consents to sue for violations of the FLSA, pursuant to 29 U.S.C. §§ 216(b) and 256. Her consent to join form was attached to the First Amended Complaint.

C. **Kim Dale**

29. Plaintiff Kim Dale worked for MHN as an MFLC from April 2009 to October 2012.

30. Specifically, she has worked for MHN as an MFLC during the following time periods:

a. From approximately April to May 2009, she worked in Ft. Campbell, Kentucky.

b. From approximately June to August 2009, she worked in Indian Head, Maryland.

c. From approximately August to December 2009, she worked in San Antonio, Texas.

d. From approximately January to May 2010, she worked in Clarksville, Tennessee.

e. From approximately August to December 2010, she worked in Ft. Campbell, Kentucky.

f. From approximately January to May 2011, she worked in Clarksville, Tennessee.

g. From approximately January to May 2012 and August to October 2012, she worked in Ft. Campbell, Kentucky.

31. Ms. Dale consents to sue for violations of the FLSA, pursuant to 29 U.S.C. §§ 216(b) and 256. Her consent to join form was attached to the First Amended Complaint.

D. Nancy Paddock

32. Plaintiff Nancy Paddock worked for MHN as an MFLC from October 2007 to October 2012.

33. Specifically, she worked for MHN as an MFLC during the following time periods:

a. From approximately October 2007 to February 2008, she worked in Ft. Campbell, Kentucky.

b. From approximately March to April 2010, she worked in Anchorage, Alaska.

c. From approximately June to July 2010, she worked in Schofield Barracks, Hawaii.

d. From approximately November 2010 to May 2011, she worked in Ft. Riley, Kansas.

e. From approximately November 2011 to January 2012, she worked in Lincoln, Nebraska and other cities in Nebraska.

f. From approximately January to April 2012, she worked in Fort Walton Beach, Florida.

g. From approximately April to June 2012, she worked in Pensacola, Florida.

h. From approximately September to October 2012, she worked in El Paso, Texas.

34. Ms. Paddock consents to sue for violations of the FLSA, pursuant to 29 U.S.C. §§ 216(b) and 256. Her consent to join form was attached to the First Amended Complaint.

E. Maria Howard

35. Plaintiff Maria Howard worked for MHN as an MFLC from August 2009 to December 2012.

36. Specifically, she worked for MHN as an MFLC during the following time periods:

a. From approximately August 2009 to October 2009, she worked in Ft. Campbell, Kentucky.

b. From approximately October 2009 to December 2009, she worked in Ft. Drum, New York.

c. From approximately March 2010 to May 2010, she worked in Albany, Georgia.

d. From approximately October 2010 to April 2011, from approximately 2012 to April 2012, and from approximately July 2012 to September 2012, she worked in Ft. Bragg, North Carolina.

e. From approximately July 2011 to October 2011, she worked in Ft. Stewart, Georgia.

f. From approximately May 2012 to July 2012, she worked in Cherry Point, North Carolina.

g. From approximately July 2012 to September 2012, she worked in Ft. Campbell, Kentucky.

h. From approximately September 2012 to October 2012, she worked in Ft. Eustis, Virginia.

i. From approximately October 2012 to December 2012, she worked at Eielson Air Force Base, Alaska.

37. Ms. Howard consents to sue for violations of the FLSA, pursuant to 29 U.S.C. §§ 216(b) and 256 Her consent to join form was filed on February 11, 2013. Docket No. 41.

F. Tim Platt

38. Plaintiff Tim Platt worked for MHN as an MFLC from approximately April 2011 to September 2012.

39. Specifically, he worked for MHN as an MFLC during the following time periods:

a. From approximately April 2011 to July 2011, he worked in Ft. Riley, Kansas.

b. From approximately July 2011 to September 2011, from approximately January 2012 to

April 2012, and from approximately August 2012 to September 2012, he worked in Ft. Huachuca, Arizona.

c. From approximately October 2011 to December 2011, he worked in Ft. Drum, New York.

d. From approximately May 2012 to July 2012, he worked in White Sands, New Mexico.

40. Mr. Platt consents to sue for violations of the FLSA, pursuant to 29 U.S.C. §§ 216(b) and 256. His consent to join form was filed on February 25, 2013. Docket No. 45.

II. Defendants (collectively, 'MHN')

A. MHN Government Services, Inc. ('MHNGS')

41. Defendant MHN Government Services, Inc. ('MHNGS') is a corporation incorporated under the laws of Delaware.

42. MHNGS's principal office and place of business is located at 2370 Kerner Boulevard, San Rafael, California.

43. MHNGS is a division of Managed Health Network, Inc. ('MHN, Inc.') *See* **https://www.mhngs.com/app/aboutus/about_us.content** (last visited Feb. 7, 2013).

B. Managed Health Network, Inc. ('MHN, Inc.')

44. MHN, Inc. is a corporation incorporated under the laws of California.

45. MHN, Inc.'s principal office and place of business is located at 2370 Kerner Boulevard, San Rafael, California.

46. According to its website, MHN, Inc. is a 'Health Net company.' *See* **https://www.mhn.com/content/about-us** (last visited Feb. 7, 2013).

47. The practices described herein were performed in and emanated from the San Rafael, California headquarters, and were performed at military bases, through CTOs that MHN entered into pursuant to its contracts with the U.S. government.

FACTUAL BACKGROUND

I. MFLCs' Work

A. Generally

48. Plaintiffs and all Class members have performed work for MHN as Military and Family Life Consultants ('MFLCs'). Throughout the relevant period, all MFLCs have consistently been misclassified by MHN as independent contractors.

49. MHN contracts with the United States Department of Defense to provide healthcare services at and around U.S. military bases. The services provided by MFLCs are an integral part of the MHN's business because, without MFLCs, MHN

could not satisfy its obligations under its contracts with the federal government.

50. MHN controls MFLCs' work and limits their freedom and discretion through various mechanisms, including (a) policies set forth in documents (e.g., the MHN Provider Manual, the Provider Services Task Order Agreement ('PSTOA' or 'Agreement'), Consultant Task Orders ('CTOs'), and other requirements) and (b) close supervision by direct supervisors and other MHN managers.

B. MHN's Use Of CTOs To Set Forth MFLCs' Assignments

51. MHN hires MFLCs using agreements known as CTOs, which resemble orders issued by the United States Armed Forces. CTOs identify the assignment location, assignment duration, amount of compensation, method of travel, lodging arrangements, and other details.

52. Each CTO states that the MFLC is only to provide the limited services mandated by the PSTOA, which in turn incorporates MHN's MFLC Provider Manual. Together, these documents place significant control over and restrictions on what MFLCs can and cannot do.

C. MFLCs' Job Duties

53. The Military and Family Life Consultant's primary duty, consistent with MHN's use of the term 'Consultant,' is to serve as a router of information for servicemembers at the military bases

to which they are assigned. According to MHN documents, MFLCs:

a. participate in 'meetings or sessions,'

b. 'promote the MFLC program and services,' and

c. 'deliver[] presentations (either psychoeducational presentations, or 'briefings' to describe the program to the population of the installation) or other types of outreach/promotion of the program.'

54. Another MHN document explains that MFLCs:

> [p]rovide short term, situational, problem solving non-medical counseling services in support of military personnel and their families at the location and for the time period specified [in the CTO] **in accordance with** the [PSTOA] executed between MHN and [MFLC] and **all requirements, policies and procedures** contained in the MFLC Provider Manual and the MFLC Quality Assurance Surveillance Program. [Emphasis added.]

55. As part of that work, MFLCs also routinely perform mundane tasks such as attending

briefings, answering phones and serving as de facto receptionists.

56. MHN provides standard materials for MFLCs to use in their work. For example, the MHN Provider Manual states that '[MFLCs] use military and contractor approved presentations.' Moreover, MHN expressly forbids MFLCs from using their own presentations or handouts on assignment; materials must be approved by an MHN supervisor.

57. Although MHN requires MFLCs to be psychologists, social workers, professional counselors, marriage family therapists, or registered nurses, it does not permit them to perform the functions traditionally associated with those jobs. Specifically, the MHN Provider Manual states:

> **Consultants are not working as traditional therapists** and should not use clinical and diagnostic terminology. **Further, because this is a consulting (rather than therapist) role, licensure in the state of assignment is not required.** [Emphasis added.]

58. Furthermore, a MHN program summary brochure describing the MFLC role explains:

> MFLCs provide informal support and outreach for Service Members and families. MFLCs work exclusively with V-Codes; **they do not diagnose or**

> **treat mental disorders**. (Mental disorders are referred to Military Mental Health resources or other **professional** resources.) [Emphasis added.]

59. MHN's 'Program Summary' also provides that:

> **The consultants' role in this program is unique in that they are not working as traditional therapists.** The stated primary MFLC role is to assess needs, provide support or refer to appropriate resources as necessary. [Emphasis added.]

60. MHN does not require MFLCs to be licensed to render services in the state in which they work.

61. Thus, while many MFLCs might be considered 'professionals' in their outside non-MHN occupations, their primary duty, based on the tasks and duties assigned them by MHN, is quite different. MFLCs' primary duty does not involve work requiring advanced knowledge in a field of science or learning.

D. MHN's Standard Training And Testing

62. MFLCs are extensively trained and tested by MHN on how to do their jobs.

63. The MHN Provider Manual explains:

> MHNGS offers **comprehensive resources** to assure that all [MFLCs] filling assignments are fully prepared. Your **required training** will assist you in understanding your role and the parameters of MFLC Service delivery. [Emphasis added.]

64. The MHN Provider Manual also states:

> Training required for all [MFLCs] includes critical program information, including **role definition**, **parameters of the program**, general information about military environments, MHNGS policies and procedures, **guidelines about specific situations**, and overall ins and outs of service delivery. This section also includes **Presentation Skills training**, which will prepares [*sic*] [MFLCs] to deliver presentations--an **essential part** of the MFLC role. [Emphasis added.]

65. To ensure that MFLCs can comply with its policies and requirements, MHN requires MFLCs to attain minimum scores (such as 80%) on tests of their knowledge of various aspects of MHN policies and requirements.

E. MHN's Supervision And Control Over MFLCs

66. MHN closely supervises MFLCs. Its 'Program Summary' explains: 'All [MFLCs] work under the direction of an MHN clinical supervisor and a military point of contact (POC).' The MHN Provider Manual reiterates this and adds:

> The FSC Officer/A&FRC Director or other military POC will provide oversight to address **day-to-day duties** and scheduling issues. The MHN supervisor provides **mandatory, weekly supervision** via telephone regarding clinical and administrative issues, making sure the [MFLCs] are **operating within the parameters of the program** and providing quality services to military members and families. All [MFLCs] are **required to attend the weekly supervision calls** regardless of how long they have been assigned to the location. [Emphasis added.]

67. MHN supervisors assign daily tasks and ensure that MFLCs complete them in the approved manner by monitoring them.

68. Deviation from the assigned method of providing services or failure to follow the instructions of MHN supervisors can result in termination of the MFLC.

69. MFLCs must adhere to a dress code, which prohibits wearing jeans or tennis shoes, among other things.

70. According to the MHN Provider Manual, MFLCs 'are expected to refrain from engaging in any political discussions with military members and their families or civilian staff either on or off the installation.'

71. The Provider Manual also requires that 'untoward events should be immediately reported to the [MFLC's] MHN supervisor. **DO NOT LEAVE A VOICEMAIL MESSAGE.**' [Emphasis in original.] The Manual provides an example of an 'untoward event' as: 'When leaving the [MFLC's] office after a consultation, a client slips and falls and is injured.'

72. MHN's control is so pervasive and detailed that it prohibits MFLCs from seeing friends or even family members at duty locations. In the MHN 'Frequently Asked Questions' pamphlet, MHN explains that '[MFLCs] are expected to focus on service delivery during assignment periods; therefore families and friends may not visit.'

73. MHN also requires MFLCs to always be within one hour from the military base at which they are assigned.

74. In short, even the MFLC's time outside of 'normal business hours' is not her own to do with as she chooses.

F. MFLCs' Hours

75. MHN requires MFLCs to work during normal business hours. Beyond those hours,

MHN often requires MFLCs to work on evenings and weekends, including 'on call' time.

76. Although MHN instructs MFLCs that '[t]he MFLC work week is typically 40 hours,' in reality, MFLCs regularly work in excess of 40 hours per workweek.

77. MHN has a policy and practice of not paying MFLCs for hours over 40 in a week. Because of their classification as independent contractors, MFLCs are not paid time and a half overtime compensation as required by the FLSA and applicable state law.

II. Misclassification

78. MHN has misclassified its MFLCs as so-called 'independent contractors.' However, the MFLCs should have been classified as nonexempt employees, as defined by the FLSA and applicable state law.

A. Independent Contractor Misclassification

79. MFLCs should have been classified as employees, not independent contractors.

80. **Dependence.** As a matter of economic reality, the MFLCs are economically dependent on MHN as opposed to being in business for themselves. MFLCs are prohibited from promoting themselves or their non-MHN businesses while on assignment.

81. **Time period.** MFLCs are engaged for lengthy periods of time—usually more than a year—under periodic contracts called CTOs. CTOs typically set forth a period of several months. CTOs are generally automatically extended unless there is a performance or personnel problem that warrants a change in assignment or termination of the MFLC. For all practical purposes, MHN renews MFLCs' CTOs so fluidly that there is little disruption, if any, in their employment period with MHN. This arrangement typically results in a de facto employment period of multiple years for MFLCs.

82. **Control.** MHN exercises significant control over MFLCs' work through several mechanisms. MFLCs are taught how to do their job, told how to do their jobs, told when to do their jobs and told where to do their jobs.

83. **Profit / loss.** MFLCs do not have an opportunity to make a profit or loss in any real sense, like true independent contractors do. MHN pays the MFLCs by the hour or week, as opposed to by commission or based on productivity. Furthermore, MHN prohibits MFLCs from engaging in other meaningful work while performing MFLC services.

84. **Employment relationship.** MHN—and not the MFLCs themselves—negotiates and obtains behavioral health contracts from the U.S. government. MFLCs are simply the labor used by MHN to meet its contractual obligations with the U.S. government. MFLCs are an integral part of

MHN's business. Without the MFLCs, MHN could not fulfill its contracts with the U.S. government. In MHN's words, MFLCs are the 'face' of the program.

85. **Termination without cause.** MHN's PSTOA reserves to MHN the right to terminate[] without cause' the relationship with the MFLCs.

86. **Tools and instrumentalities.** MHN provides the resources, assets, and parameters that determine how the MFLCs carry out their assignments. According to the MHN Provider Manual, MHN 'provide[s] all written materials such as presentations, power points, handouts, etc.' MFLCs do not bring their own tools to the job in any meaningful way. The Manual explains that MFLCs 'will not be able to use any of their own materials or develop any new materials without approval from the MHN Director of Quality and the military POC. In fact, '[a]ll promotional materials, such as brochures and business cards, will be provided by the installation. [MFLCs] who are asked by the military POC to create any type of promotional materials should contact the MHN supervisor.'

87 **No subordinates.** MFLCs do not supervise other individuals. MFLCs do not hire their own employees to facilitate their assignments. They are not allowed to subcontract.

B. Exemption Misclassification

88. CTOs. MHN's CTOs provide for MFLCs to be paid in one of two ways: on an hourly or salary basis.

a. **Hourly.** Where MFLCs' CTOs provide for hourly pay, MHN cannot satisfy the FLSA's or applicable state laws' salary basis test, because they are not paid on a salary basis. Therefore, those MFLCs cannot be classified as exempt employees.

b. **Salary.** Where MFLCs' CTOs provide for salary pay, MHN cannot satisfy the FLSA's or applicable state laws' salary basis test because MHN has a policy and practice of making improper compensation deductions that violate the salary basis test. Specifically, those CTOs provide that when an MFLC 'performs less than the full services contracted during a standard workweek for reasons other than a federally recognized holiday, MHN reserves the right to prorate the [MFLCs] payment accordingly.'

89. **Nonexempt.** MFLCs do not fit within any exemption to the FLSA or applicable state law.

III. Benefits Available To MHN Employees

90. Because they should properly be considered employees, MFLCs are entitled to the same benefits to which properly classified MHN employees are entitled.

91. On information and belief, all full-time MHN employees are entitled to the following benefits: (1) medical, (2) dental, (3) vision, (4) group legal, (5) life, (6) short- and long-term disability, (7) accidental death and dismemberment, (8) paid time off, and (9) 401(k). These benefits were not provided to Plaintiffs or Class members.

IV. MHN's Unconscionable Arbitration Clause

92. As a condition of employment, MHN requires MFLCs to sign a PSTOA that includes, in the 20th of 23 paragraphs, a binding arbitration clause. This Agreement (including the arbitration clause it contains) is presented on a take-it-or-leave-it basis, and cannot be negotiated.

93. The arbitration clause is both procedurally and substantively unconscionable.

a. The arbitration clause is procedurally unconscionable because (1) it is a form contract presented on a take-it-or-leave-it basis, (2) the applicable rules were not provided at the time of signature, and (3) the arbitration provision is buried in a longer contract, with no requirement that the MFLC sign it separately.

b. The arbitration clause is substantively unconscionable because it provides (1) that the statute of limitations is limited to six months, (2) that MHN can select any three arbitrators it wishes, from which the plaintiff selects

one, (3) that punitive damages are prohibited, (4) that discovery is limited to one fact witness and one expert witness per party, (4) that substantive cost- and fee-shifting rules under the FLSA, California law, and other laws are changed to MHN's unilateral advantage, (5) that MFLCs must bear unusually high arbitration filing fees, and (7) that independent contractor misclassification claims are completely barred because the arbitrator cannot 'refuse to enforce any agreements between the parties [e.g., the independent contractor agreement].'

94. The arbitration clause is so permeated with unconscionability that severance is inappropriate, and the entire clause must be stricken.

95. Accordingly, Plaintiffs, on behalf of themselves and all Class members, seek a declaratory judgment from this Court that MHN's mandatory arbitration clause is unconscionable and unenforceable.

COLLECTIVE ACTION ALLEGATIONS

96. Plaintiffs bring the First Claim for Relief for violation of the FLSA as a collective action pursuant to section 16(b) of the FLSA, 29 U.S.C. § 216(b), on behalf of the Nationwide FLSA Plaintiffs.

97 Plaintiffs and Nationwide FLSA Plaintiffs are similarly situated in that they have substantially similar job requirements and pay provisions, and are subject to MHN's common

practice, policy, or plan of unlawfully characterizing them as independent contractors and refusing to pay them overtime pay in violation of the FLSA.

98. The First Claim for Relief for violations of the FLSA may be brought and maintained as an 'opt-in' collective action pursuant to section 16(b) of the FLSA, 29 U.S.C. § 216(b), since the claims of Plaintiffs are similar to the claims of the Nationwide FLSA Plaintiffs.

99. The contact information (including names, addresses, phone numbers, email addresses, and other identifying information) of the Nationwide FLSA Plaintiffs are available from MHN's records. Notice should be provided to the Nationwide FLSA Plaintiffs via first class mail, email, and posting in the offices where they have worked as soon as practicable, to allow the MFLCs to make informed decisions regarding their rights to seek overtime pay and other remedies.

CALIFORNIA CLASS ACTION ALLEGATIONS

100. The California Named Plaintiff (Ms. Baldini) brings the Second, Third, Fourth, Fifth, Sixth, and Seventh Claims for Relief for violation of California's wage and hour, unfair competition, and private attorney general laws as a class action, pursuant to Fed. R. Civ. P. 23(a) and (b)(3), on behalf of all California Class members, defined in paragraph 15.

101. **Numerosity** (Fed. R. Civ. P. 23(a)(1))–The California Class is so numerous that

joinder of all members is impracticable. The California Named Plaintiff is informed and believes, and on that basis alleges, that during the California Class Period, MHN has employed at least fifty persons who satisfy the definition of the California Class.

102. **Commonality** (Fed. R. Civ. P. 23(a)(2))–Common questions of law and fact exist as to members of the California Class, including, but not limited to, the following:

a. Whether MHN unlawfully classified the California Class members as independent contractors;

b. Whether the California Class members are nonexempt employees entitled to overtime compensation for overtime hours worked under the overtime pay requirements of California law;

c. Whether MHN unlawfully failed to pay overtime compensation in violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and the California Labor Code and related regulations, Cal. Labor Code §§ 201, 202, 203, 226, 510, 1174, 1174.5, and 1194, Cal. Wage Order No. 4-2001;

d. Whether MHN's policy and practice of classifying the California Class members as independent contractors exempt from overtime entitlement under California law and MHN's policy and practice of failing to pay overtime to California

Class members violate applicable provisions of California law, including applicable statutory and regulatory authority;

e. Whether MHN unlawfully failed to keep and furnish California Class members with records of hours worked, in violation of Labor Code §§ 226 and 1174;

f. Whether MHN unlawfully failed to provide California Class members with meal and rest breaks, in violation of Labor Code §§ 226.7 and 512;

g. Whether MHN's policy and practice of failing to pay its employees all wages due within the time required by law after their employment ended violates California law; and

h. The proper measure of damages sustained and the proper measure of restitution recoverable by members of the California Class.

103. **Typicality** (Fed. R. Civ. P. 23(a)(3))–The California Named Plaintiff's claims are typical of California Class members' claims. The California Named Plaintiff, like other California Class members, was subjected to MHN's policy and practice of refusing to pay overtime in violation of California law. The California Named Plaintiff's job duties were typical of those of other California Class members.

104. **Adequacy** (Fed. R. Civ. P. 23(a)(4))–The California Named Plaintiff will fairly

and adequately represent and protect the interests of the California Class members.

105. **Adequacy of counsel** (Fed. R. Civ. P. 23(g))–The California Named Plaintiff has retained counsel competent and experienced in complex class actions, the FLSA, and state labor and employment litigation. Plaintiffs' counsel have litigated numerous class actions on behalf of employees asserting overtime misclassification claims under the FLSA and state law. Plaintiffs' counsel intend to commit the necessary resources to prosecute this action vigorously for the benefit of all Class members.

106. **Predominance and superiority** (Fed. R. Civ. P 23(b)(3))–Class certification of the Second, Third, Fourth, Fifth, and Sixth Claims for Relief is appropriate under Fed. R. Civ. P. 23(b)(3) because questions of law and fact common to the California Class predominate over any questions affecting only individual members of the California Class, and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation. MHN's common and uniform policies and practices unlawfully treat California Class members as independent contractors exempt from overtime pay requirements. The damages suffered by individual California Class members are small compared to the expense and burden of individual prosecution of this litigation. In addition, class certification is superior because it will obviate the need for unduly duplicative litigation that might result in inconsistent judgments about MHN's practices.

107. **Notice** (Fed. R. Civ. P. 23(c)(2)(B))–The California Named Plaintiff intends to send notice to all California Class members consistent with the requirements of Fed. R. Civ. P. 23.

HAWAII CLASS ACTION ALLEGATIONS

108. The Hawaii Named Plaintiff (Ms. Paddock) brings the Eighth Claim for Relief for violation of Hawaii's Wage and Hour Law as a class action, pursuant to Fed. R. Civ. P. 23(a) and (b)(3), on behalf of all Hawaii Class members, defined in paragraph 16.

109. **Numerosity** (Fed. R. Civ. P. 23(a)(1))–The Hawaii Class is so numerous that joinder of all members is impracticable. The Hawaii Named Plaintiff is informed and believes, and on that basis alleges, that during the Hawaii Class Period, MHN has employed at least fifty persons who satisfy the definition of the Hawaii Class.

110. **Commonality** (Fed. R. Civ. P. 23(a)(2))–Common questions of law and fact exist as to members of the Hawaii Class, including, but not limited to, the following:

a. Whether MHN unlawfully classified the Hawaii Class members as independent contractors;

b. Whether the Hawaii Class members are nonexempt employees entitled to

overtime compensation for overtime hours worked under the overtime pay requirements of Hawaii law;

c. Whether MHN unlawfully failed to pay overtime compensation in violation of the Haw. Rev. Stat. § 387-3;

d. Whether MHN's policy and practice of classifying the Hawaii Class members as independent contractors exempt from overtime entitlement under Hawaii law and MHN's policy and practice of failing to pay overtime to Hawaii Class members violate applicable provisions of Hawaii law, including applicable statutory and regulatory authority;

e. Whether liquidated damages should be awarded to the Hawaii Class members; and

f. The proper measure of damages sustained and recoverable by members of the Hawaii Class.

111. **Typicality** (Fed. R. Civ. P. 23(a)(3))–The Hawaii Named Plaintiff's claims are typical of Hawaii Class members' claims. The Hawaii Named Plaintiff, like other Hawaii Class members, was subjected to MHN's policy and practice of refusing to pay overtime in violation of Hawaii law. The Hawaii Named Plaintiff's job duties were typical of those of other Hawaii Class members.

112. **Adequacy** (Fed. R. Civ. P. 23(a)(4))–The Hawaii Named Plaintiff will fairly and

adequately represent and protect the interests of the Hawaii Class members.

113. **Adequacy of counsel** (Fed. R. Civ. P 23(g))–The Hawaii Named Plaintiff has retained counsel competent and experienced in complex class actions, the FLSA, and state labor and employment litigation. Plaintiffs' counsel have litigated numerous class actions on behalf of employees asserting overtime misclassification claims under the FLSA and state law. Plaintiffs' counsel intend to commit the necessary resources to prosecute this action vigorously for the benefit of all Class members.

114. **Predominance and superiority** (Fed. R. Civ. P. 23(b)(3))–Class certification of the Eighth Claim for Relief is appropriate under Fed. R. Civ. P. 23(b)(3) because questions of law and fact common to the Hawaii Class predominate over any questions affecting only individual members of the Hawaii Class, and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation. MHN's common and uniform policies and practices unlawfully treat Hawaii Class members as independent contractors exempt from overtime pay requirements. The damages suffered by individual Hawaii Class members are small compared to the expense and burden of individual prosecution of this litigation. In addition, class certification is superior because it will obviate the need for unduly duplicative litigation that might result in inconsistent judgments about MHN's practices.

115. **Notice** (Fed. R. Civ. P. 23(c)(2)(B))–The Hawaii Named Plaintiff intends to send notice to all Hawaii Class members consistent with the requirements of Fed. R. Civ. P. 23.

KENTUCKY CLASS ACTION ALLEGATIONS

116. The Kentucky Named Plaintiffs (Ms. Dale and Ms. Paddock) bring the Ninth Claim for Relief for violation of Kentucky's wage and hour laws as a class action, pursuant to Fed. R. Civ. P 23(a) and (b)(3), on behalf of all Kentucky Class members, defined in paragraph 17.

117. **Numerosity** (Fed. R. Civ. P. 23(a)(1))–The Kentucky Class is so numerous that joinder of all members is impracticable. The Kentucky Named Plaintiffs are informed and believe, and on that basis allege, that during the Kentucky Class Period, MHN has employed at least fifty persons who satisfy the definition of the Kentucky Class.

118. **Commonality** (Fed. R. Civ. P 23(a)(2))–Common questions of law and fact exist as to members of the Kentucky Class, including, but not limited to, the following:

a. Whether MHN unlawfully classified the Kentucky Class members as independent contractors;

b. Whether the Kentucky Class members are nonexempt employees entitled to overtime compensation for overtime hours worked

under the overtime pay requirements of Kentucky law;

c. Whether MHN unlawfully failed to pay overtime compensation in violation of the Kentucky Wage Laws, KRS §§ 337.020, 337.060, & 337.285;

d. Whether MHN's policy and practice of classifying the Kentucky Class members as independent contractors exempt from overtime entitlement under Kentucky law and MHN's policy and practice of failing to pay overtime to Kentucky Class members violate applicable provisions of Kentucky law, including applicable statutory and regulatory authority;

e. Whether MHN failed to provide legally mandated meal and rest breaks to the Kentucky Class members, pursuant to KRS § 337.355 and KRS § 337.365;

f. Whether MHN unlawfully failed to keep and furnish Kentucky Class members with records of hours worked, in violation of the Kentucky Wage Laws, KRS §§ 337.070 & 337.320;

g. Whether liquidated damages should be awarded to the Kentucky Class members; and

h. The proper measure of damages sustained and recoverable by members of the Kentucky Class.

119. **Typicality** (Fed. R. Civ. P. 23(a)(3))–The Kentucky Named Plaintiffs' claims are typical of Kentucky Class members' claims. The Kentucky Named Plaintiffs, like other Kentucky Class members, were subjected to MHN's policy and practice of refusing to pay overtime in violation of Kentucky law. The Kentucky Named Plaintiffs' job duties were typical of those of other Kentucky Class members.

120. **Adequacy** (Fed. R. Civ. P 23(a)(4))–The Kentucky Named Plaintiffs will fairly and adequately represent and protect the interests of the Kentucky Class members.

121. **Adequacy of counsel** (Fed. R. Civ. P. 23(g))–The Kentucky Named Plaintiffs have retained counsel competent and experienced in complex class actions, the FLSA, and state labor and employment litigation. Plaintiffs' counsel have litigated numerous class actions on behalf of employees asserting overtime misclassification claims under the FLSA and state law. Plaintiffs' counsel intend to commit the necessary resources to prosecute this action vigorously for the benefit of all Class members.

122. **Predominance and superiority** (Fed. R. Civ. P. 23(b)(3))–Class certification of the Ninth Claim for Relief is appropriate under Fed. R. Civ. P. 23(b)(3) because questions of law and fact common to the Kentucky Class predominate over any questions affecting only individual members of the Kentucky Class, and because a class action is superior to other available

methods for the fair and efficient adjudication of this litigation. MHN's common and uniform policies and practices unlawfully treat Kentucky Class members as independent contractors exempt from overtime pay requirements. The damages suffered by individual Kentucky Class members are small compared to the expense and burden of individual prosecution of this litigation. In addition, class certification is superior because it will obviate the need for unduly duplicative litigation that might result in inconsistent judgments about MHN's practices.

123. **Notice** (Fed. R. Civ. P. 23(c)(2)(B))–The Kentucky Named Plaintiffs intend to send notice to all Kentucky Class members consistent with the requirements of Fed. R. Civ. P. 23.

NEVADA CLASS ACTION ALLEGATIONS

124. The Nevada Named Plaintiff (Mr. Zaborowski) brings the Tenth Claim for Relief for violation of Nevada's wage and hour laws as a class action, pursuant to Fed. R. Civ. P. 23(a) and (b)(3), on behalf of all Nevada Class members, defined in paragraph 18.

125. **Numerosity** (Fed. R. Civ. P 23(a)(1))–The Nevada Class is so numerous that joinder of all members is impracticable. The Nevada Named Plaintiff is informed and believes, and on that basis alleges, that during the Nevada Class Period, MHN has employed at least fifty persons who satisfy the definition of the Nevada Class.

126. **Commonality** (Fed. R. Civ. P. 23(a)(2))–Common questions of law and fact exist as to members of the Nevada Class, including, but not limited to, the following:

a. Whether MHN unlawfully classified the Nevada Class members as independent contractors;

b. Whether the Nevada Class members are nonexempt employees entitled to overtime compensation for overtime hours worked under the overtime pay requirements of Nevada law;

c. Whether MHN unlawfully failed to pay overtime compensation in violation of the Nevada Wage and Hour Law, Nev. Rev. Stat. § 608.018 & 608.260;

d. Whether MHN's policy and practice of classifying the Nevada Class members as independent contractors exempt from overtime entitlement under Nevada law and MHN's policy and practice of failing to pay overtime to Nevada Class members violate applicable provisions of Nevada law, including applicable statutory and regulatory authority;

e. Whether MHN's policy and practice of failing to pay its employees all wages due within the time required by law after their employment ended violates Nevada law; and

f. The proper measure of damages sustained and the proper measure of restitution recoverable by members of the Nevada Class.

127. **Typicality** (Fed. R. Civ. P 23(a)(3))–The Nevada Named Plaintiff's claims are typical of Nevada Class members' claims. The Nevada Named Plaintiff, like other Nevada Class members, was subjected to MHN's policy and practice of refusing to pay overtime in violation of Nevada law. The Nevada Named Plaintiff's job duties were typical of those of other Nevada Class members.

128. **Adequacy** (Fed. R. Civ. P. 23(a)(4))–The Nevada Named Plaintiff will fairly and adequately represent and protect the interests of the Nevada Class members.

129. **Adequacy of counsel** (Fed. R. Civ. P. 23(g))–The Nevada Named Plaintiff has retained counsel competent and experienced in complex class actions, the FLSA, and state labor and employment litigation. Plaintiffs' counsel have litigated numerous class actions on behalf of employees asserting overtime misclassification claims under the FLSA and state law. Plaintiffs' counsel intend to commit the necessary resources to prosecute this action vigorously for the benefit of all Class members.

130. **Predominance and superiority** (Fed. R. Civ. P. 23(b)(3))–Class certification of the Tenth Claim for Relief is appropriate under Fed. R. Civ. P. 23(b)(3) because questions of law and fact common to the Nevada

Class predominate over any questions affecting only individual members of the Nevada Class, and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation. MHN's common and uniform policies and practices unlawfully treat Nevada Class members as independent contractors exempt from overtime pay requirements. The damages suffered by individual Nevada Class members are small compared to the expense and burden of individual prosecution of this litigation. In addition, class certification is superior because it will obviate the need for unduly duplicative litigation that might result in inconsistent judgments about MHN's practices.

131. **Notice** (Fed. R. Civ. P. 23(c)(2)(B))–The Nevada Named Plaintiff intends to send notice to all Nevada Class members consistent with the requirements of Fed. R. Civ. P. 23.

NEW MEXICO CLASS ACTION ALLEGATIONS

132. The New Mexico Named Plaintiff (Mr. Platt) brings the Eleventh Claim for Relief for violation of New Mexico's Wage and Hour Law as a class action, pursuant to Fed. R. Civ. P. 23(a) and (b)(3), on behalf of all New Mexico Class members, defined in paragraph 19.

133. **Numerosity** (Fed. R. Civ. P 23(a)(1))–The New Mexico Class is so numerous that joinder of all members is impracticable. The New Mexico Named Plaintiff is informed and believes, and on that basis alleges, that during the New Mexico Class Period, MHN has employed at least fifty

persons who satisfy the definition of the New Mexico Class.

134. **Commonality** (Fed. R. Civ. P. 23(a)(2))–Common questions of law and fact exist as to members of the New Mexico Class, including, but not limited to, the following:

a. Whether MHN unlawfully classified the New Mexico Class members as independent contractors;

b. Whether the New Mexico Class members are nonexempt employees entitled to overtime compensation for overtime hours worked under the overtime pay requirements of New Mexico law;

c. Whether MHN unlawfully failed to pay overtime compensation in violation of the N.M. Stat. Ann. § 50-4-22(C);

d. Whether MHN's policy and practice of classifying the New Mexico Class members as independent contractors exempt from overtime entitlement under New Mexico law and MHN's policy and practice of failing to pay overtime to New Mexico Class members violate applicable provisions of New Mexico law, including applicable statutory and regulatory authority;

e. Whether liquidated damages should be awarded to the New Mexico Class members; and

f. The proper measure of damages sustained and recoverable by members of the New Mexico Class.

135. **Typicality** (Fed. R. Civ. P. 23(a)(3))–The New Mexico Named Plaintiff's claims are typical of New Mexico Class members' claims. The New Mexico Named Plaintiff, like other New Mexico Class members, was subjected to MHN's policy and practice of refusing to pay overtime in violation of New Mexico law. The New Mexico Named Plaintiff's job duties were typical of those of other New Mexico Class members.

136. **Adequacy** (Fed. R. Civ. P. 23(a)(4))–The New Mexico Named Plaintiff will fairly and adequately represent and protect the interests of the New Mexico Class members.

137. **Adequacy of counsel** (Fed. R. Civ. P. 23(g))–The New Mexico Named Plaintiff has retained counsel competent and experienced in complex class actions, the FLSA, and state labor and employment litigation. Plaintiffs' counsel have litigated numerous class actions on behalf of employees asserting overtime misclassification claims under the FLSA and state law. Plaintiffs' counsel intend to commit the necessary resources to prosecute this action vigorously for the benefit of all Class members.

138. **Predominance and superiority** (Fed. R. Civ. P. 23(b)(3))–Class certification of the Eleventh Claim for Relief is appropriate under Fed. R. Civ. P. 23(b)(3) because

questions of law and fact common to the New Mexico Class predominate over any questions affecting only individual members of the New Mexico Class, and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation. MHN's common and uniform policies and practices unlawfully treat New Mexico Class members as independent contractors exempt from overtime pay requirements. The damages suffered by individual New Mexico Class members are small compared to the expense and burden of individual prosecution of this litigation. In addition, class certification is superior because it will obviate the need for unduly duplicative litigation that might result in inconsistent judgments about MHN's practices.

139. **Notice** (Fed. R. Civ. P. 23(c)(2)(B))–The New Mexico Named Plaintiff intends to send notice to all New Mexico Class members consistent with the requirements of Fed. R. Civ. P. 23.

NEW YORK CLASS ACTION ALLEGATIONS

140. The New York Named Plaintiffs (Ms. Howard and Mr. Platt) bring the Twelfth and Thirteenth Claims for Relief for violation of New York's Wage and Hour Law as a class action, pursuant to Fed. R. Civ. P. 23(a) and (b)(3), on behalf of all New York Class members, defined in paragraph 20.

141. **Numerosity** (Fed. R. Civ. P. 23(a)(1))–The New York Class is so numerous that joinder of all members is impracticable. The New York

Named Plaintiffs are informed and believe, and on that basis allege, that during the New York Class Period, MHN has employed at least fifty persons who satisfy the definition of the New York Class.

142. **Commonality** (Fed. R. Civ. P. 23(a)(2))–Common questions of law and fact exist as to members of the New York Class, including, but not limited to, the following:

a. Whether MHN unlawfully classified the New York Class members as independent contractors;

b. Whether the New York Class members are nonexempt employees entitled to overtime compensation for overtime hours worked under the overtime pay requirements of New York law;

c. Whether MHN unlawfully failed to pay overtime compensation in violation of New York Labor Law;

d. Whether MHN's policy and practice of classifying the New York Class members as independent contractors exempt from overtime entitlement under New York law and MHN's policy and practice of failing to pay overtime to New York Class members violate applicable provisions of New York law, including applicable statutory and regulatory authority;

e. Whether MHN had a policy and practice of failing and refusing to pay 'spread of hours'

compensation to the New York Named Plaintiffs and the New York Class members for their shifts of greater than ten hours; and

f. The proper measure of damages sustained and recoverable by members of the New York Class.

143. **Typicality** (Fed. R. Civ. P. 23(a)(3))–The New York Named Plaintiffs' claims are typical of New York Class members' claims. The New York Named Plaintiffs, like other New York Class members, were subjected to MHN's policy and practice of refusing to pay overtime in violation of New York law. The New York Named Plaintiffs' job duties were typical of those of other New York Class members.

144. **Adequacy** (Fed. R. Civ. P. 23(a)(4))–The New York Named Plaintiffs will fairly and adequately represent and protect the interests of the New York Class members.

145. **Adequacy of counsel** (Fed. R. Civ. P. 23(g))–The New York Named Plaintiffs have retained counsel competent and experienced in complex class actions, the FLSA, and state labor and employment litigation. Plaintiffs' counsel have litigated numerous class actions on behalf of employees asserting overtime misclassification claims under the FLSA and state law. Plaintiffs' counsel intend to commit the necessary resources to prosecute this action vigorously for the benefit of all Class members.

146. **Predominance and superiority** (Fed. R. Civ. P 23(b)(3))–Class certification of the Twelfth and Thirteenth Claims for Relief is appropriate under Fed. R. Civ. P. 23(b)(3) because questions of law and fact common to the New York Class predominate over any questions affecting only individual members of the New York Class, and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation. MHN's common and uniform policies and practices unlawfully treat New York Class members as independent contractors exempt from overtime pay requirements. The damages suffered by individual New York Class members are small compared to the expense and burden of individual prosecution of this litigation. In addition, class certification is superior because it will obviate the need for unduly duplicative litigation that might result in inconsistent judgments about MHN's practices.

147. **Notice** (Fed. R. Civ. P. 23(c)(2)(B))–The New York Named Plaintiffs intend to send notice to all New York Class members consistent with the requirements of Fed. R. Civ. P. 23.

NORTH CAROLINA CLASS ACTION ALLEGATIONS

148. The North Carolina Named Plaintiff (Ms. Howard) brings the Fourteenth Claim for Relief for violation of North Carolina's Wage and Hour Law as a class action, pursuant to Fed. R. Civ.

P. 23(a) and (b)(3), on behalf of all North Carolina Class members, defined in paragraph 21.

149. **Numerosity** (Fed. R. Civ. P. 23(a)(1))–The North Carolina Class is so numerous that joinder of all members is impracticable. The North Carolina Named Plaintiff is informed and believes, and on that basis alleges, that during the North Carolina Class Period, MHN has employed at least fifty persons who satisfy the definition of the North Carolina Class.

150. **Commonality** (Fed. R. Civ. P. 23(a)(2))–Common questions of law and fact exist as to members of the North Carolina Class, including, but not limited to, the following:

a. Whether MHN unlawfully classified the North Carolina Class members as independent contractors;

b. Whether the North Carolina Class members are nonexempt employees entitled to overtime compensation for overtime hours worked under the overtime pay requirements of North Carolina law;

c. Whether MHN unlawfully failed to pay overtime compensation in violation of the NCWHA;

d. Whether MHN's policy and practice of classifying the North Carolina Class members as independent contractors exempt from overtime entitlement under North Carolina law and

MHN's policy and practice of failing to pay overtime to North Carolina Class members violate applicable provisions of North Carolina law, including applicable statutory and regulatory authority;

e. Whether liquidated damages should be awarded to the North Carolina Class members; and

f. The proper measure of damages sustained and recoverable by members of the North Carolina Class.

151. **Typicality** (Fed. R. Civ. P. 23(a)(3))–The North Carolina Named Plaintiff's claims are typical of North Carolina Class members' claims. The North Carolina Named Plaintiff, like other North Carolina Class members, was subjected to MHN's policy and practice of refusing to pay overtime in violation of North Carolina law. The North Carolina Named Plaintiff's job duties were typical of those of other North Carolina Class members.

152. **Adequacy** (Fed. R. Civ. P. 23(a)(4))–The North Carolina Named Plaintiff will fairly and adequately represent and protect the interests of the North Carolina Class members.

153. **Adequacy of counsel** (Fed. R. Civ. P. 23(g))–The North Carolina Named Plaintiff has retained counsel competent and experienced in complex class actions, the FLSA, and state labor and employment litigation. Plaintiffs' counsel have litigated numerous class actions on behalf of

employees asserting overtime misclassification claims under the FLSA and state law. Plaintiffs' counsel intend to commit the necessary resources to prosecute this action vigorously for the benefit of all Class members.

154. **Predominance and superiority** (Fed. R. Civ. P. 23(b)(3))–Class certification of the Fourteenth Claim for Relief is appropriate under Fed. R. Civ. P. 23(b)(3) because questions of law and fact common to the North Carolina Class predominate over any questions affecting only individual members of the North Carolina Class, and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation. MHN's common and uniform policies and practices unlawfully treat North Carolina Class members as independent contractors exempt from overtime pay requirements. The damages suffered by individual North Carolina Class members are small compared to the expense and burden of individual prosecution of this litigation. In addition, class certification is superior because it will obviate the need for unduly duplicative litigation that might result in inconsistent judgments about MHN's practices.

155. **Notice** (Fed. R. Civ. P. 23(c)(2)(B))–The North Carolina Named Plaintiff intends to send notice to all North Carolina Class members consistent with the requirements of Fed. R. Civ. P 23.

FIRST CLAIM FOR RELIEF

(Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, Brought by Plaintiffs on Behalf of Themselves and the Nationwide FLSA Plaintiffs)

156. Plaintiffs, on behalf of themselves and all Nationwide FLSA Plaintiffs, reallege and incorporate by reference paragraphs 1 through 107 as if they were set forth again herein.

157. At all relevant times, MHN has been, and continues to be, an 'employer' engaged in interstate 'commerce' and/or in the production of 'goods' for 'commerce,' within the meaning of the FLSA, 29 U.S.C. § 203. At all relevant times, MHN has employed, and continues to employ, 'employee[s],' including Plaintiff and the Nationwide FLSA Plaintiffs. At all relevant times, MHN has had gross operating revenues in excess of $500,000.

158. Plaintiffs' signed Consent to Sue forms have been filed, pursuant to section 16(b) of the FLSA, 29 U.S.C. §§ 216(b) and 256. It is likely that other similarly situated individuals will sign consent forms and join as Plaintiffs in asserting this claim in the future.

159. The FLSA requires each covered employer, including MHN, to compensate all nonexempt employees at a rate of not less than one and one-half times the regular rate of pay for work performed in excess of forty hours in a workweek.

160. Under the FLSA, the Nationwide FLSA Plaintiffs are employees who are

entitled to be paid overtime compensation for all overtime hours worked.

161. At all relevant times, MHN, pursuant to its policies and practices, failed and refused to pay overtime premiums to the Nationwide FLSA Plaintiffs for their hours worked in excess of forty hours per week.

162. By failing to compensate Plaintiffs and the Nationwide FLSA Plaintiffs at a rate not less than one and one-half times the regular rate of pay for work performed in excess of forty hours in a workweek, MHN has violated, and continues to violate, the FLSA, 29 U.S.C. §§ 201 *et seq.*, including 29 U.S.C. § 207(a)(1) and § 215(a).

163. By failing to record, report, and/or preserve records of hours worked by Plaintiffs and the Nationwide FLSA Plaintiffs, MHN has failed to make, keep, and preserve records with respect to each of its employees sufficient to determine their wages, hours, and other conditions and practice of employment, in violation of the FLSA, 29 U.S.C. §§ 201 *et seq.*, including 29 U.S.C. § 211(c) and § 215(a).

164. The foregoing conduct, as alleged, constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. § 255(a).

165. Plaintiffs, on behalf of themselves and the Nationwide FLSA Plaintiffs, seek recovery of attorneys' fees and costs of action to be paid by MHN, as provided by the FLSA, 29 U.S.C. § 216(b).

166. Plaintiffs, on behalf of themselves and the Nationwide FLSA Plaintiffs, seek damages in the amount of unpaid overtime compensation, liquidated damages as provided by the FLSA, 29 U.S.C. § 216(b), interest, and such other legal and equitable relief as the Court deems just and proper.

SECOND CLAIM FOR RELIEF
(Cal. Wage Order No. 4-2001; Cal. Labor Code §§ 510, 1194, Brought by the California Named Plaintiff on Behalf of Herself and the California Class)

167. The California Named Plaintiff, on behalf of herself and all members of the California Class, realleges and incorporates by reference paragraphs 1 through 166 as if they were set forth again herein.

168. California law requires an employer, such as MHN, to pay overtime compensation to all nonexempt employees for all hours worked over forty per week, or over eight per day.

169. Under California law, the California Named Plaintiff and California Class members are nonexempt employees entitled to be paid overtime compensation for all overtime hours worked.

170. Throughout the California Class Period, and continuing through the present, the California Named Plaintiff and California Class members worked in excess of eight hours in a

workday and/or forty hours in a workweek. Certain California Class members also worked in excess of twelve hours in a workday.

171. During the California Class Period, MHN misclassified the California Named Plaintiff and California Class members as independent contractors, exempt from overtime pay entitlement, and failed and refused to pay them overtime premium pay for their overtime hours worked.

172. As a direct and proximate result of MHN's unlawful conduct, as set forth herein, the California Named Plaintiff and California Class members have sustained damages, including loss of earnings for hours of overtime worked on behalf of MHN in an amount to be established at trial, prejudgment interest, and costs and attorneys' fees, pursuant to statute and other applicable law.

THIRD CLAIM FOR RELIEF
(California Wage Payment Provisions, Cal. Labor Code §§ 201, 202, & 203, Brought by the California Named Plaintiff on Behalf of Herself and the California Class)

173. The California Named Plaintiff, on behalf of herself and the California Class members, realleges and incorporates by reference paragraphs 1 through 172 as if they were set forth again herein.

174. California Labor Code sections 201 and 202 require MHN to pay its employees all

wages due within the time specified by law. California Labor Code section 203 provides that if an employer willfully fails to timely pay such wages, the employer must continue to pay the subject employees' wages until the back wages are paid in full or an action is commenced, up to a maximum of thirty days of wages.

175. The California Named Plaintiff and all California Class members who ceased employment with MHN are entitled to unpaid compensation, but to date have not received such compensation.

176. More than thirty days have passed since The California Named Plaintiff and certain California Class members left MHN's employ.

177. As a consequence of MHN's willful conduct in not paying compensation for all hours worked, The California Named Plaintiff and California Class members whose employment ended during the class period are entitled to thirty days' wages under Labor Code section 203, together with interest thereon and attorneys' fees and costs.

FOURTH CLAIM FOR RELIEF
(California Record-Keeping Provisions, Cal. Wage Order No. 4-2001; Cal. Labor Code §§ 226, 1174, & 1174.5, Brought by the California Named Plaintiff on Behalf of Herself and the California Class)

178. The California Named Plaintiff, on behalf of herself and all members of the California Class, realleges and incorporates by reference paragraphs 1 through 177 as if they were set forth again herein.

179. MHN knowingly and intentionally failed to provide timely, accurate, itemized wage statements including, *inter alia*, hours worked, to The California Named Plaintiff and California Class members in accordance with Labor Code section 226(a) and the IWC Wage Orders. Such failure caused injury to The California Named Plaintiff and California Class members, by, among other things, impeding them from knowing the amount of wages to which they are and were entitled. At all times relevant herein, MHN has failed to maintain records of hours worked by The California Named Plaintiff and California Class members as required under Labor Code section 1174(d).

180. The California Named Plaintiff and California Class members are entitled to and seek injunctive relief requiring MHN to comply with Labor Code sections 226(a) and 1174(d), and further seek the amount provided under Labor Code sections 226(e) and 1174.5, including the greater of all actual damages or fifty dollars ($50) for the initial pay

period in which a violation occurred and one hundred dollars ($100) per employee for each violation in a subsequent pay period.

FIFTH CLAIM FOR RELIEF
(California Meal And Rest Period Provisions, Cal. Wage Order No. 4-2001; Cal. Labor Code §§ 226.7 & 512, Brought by The California Named Plaintiff on Behalf of Herself and the California Class)

181. The California Named Plaintiff, on behalf of herself and all members of the California Class, realleges and incorporates by reference paragraphs 1 through 180 as if they were set forth again herein.

182. The California Named Plaintiff and California Class members regularly work and have worked in excess of five-hour shifts without being afforded at least a half-hour meal break in which they were relieved of all duty and more than ten-hour shifts without being afforded a second half-hour meal break in which they were relieved of all duty, as required by Labor Code sections 226.7 and 512 and Wage Order No. 4-2001, section 11(a).

183. In addition, the California Named Plaintiff and California Class members regularly work and have worked without being afforded at least one ten-minute rest break, in which they were relieved of all duty, per four hours of work performed or major fraction thereof, as required by Labor Code section 226.7 and Wage Order No. 4-2001, section 12.

184. As a result of MHN's failure to afford proper meal periods, it is liable to the California Named Plaintiff and California Class members for one hour of additional pay at the regular rate of compensation for each workday that the proper meal periods were not provided, pursuant to Labor Code section 226.7 and Wage Order No. 4-2001, section 11(b).

185. As a result of MHN's failure to afford proper rest periods, it is liable to the California Named Plaintiff and California Class members for one hour of additional pay at the regular rate of compensation for each workday that the proper rest periods were not provided, pursuant to Labor Code section 226.7 and Wage Order No. 4-2001, section 12(b).

SIXTH CLAIM FOR RELIEF
(California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, Brought by The California Named Plaintiff on Behalf of Herself and the California Class)

186. The California Named Plaintiff, on behalf of herself and all members of the California Class, realleges and incorporates by reference paragraphs 1 through 185 as if they were set forth again herein.

187. The foregoing conduct, as alleged, violates the California Unfair Competition Law ('UCL'), Cal. Bus. & Prof. Code §§ 17200 *et seq.* Section 17200 of the Cal. Bus. & Prof. Code prohibits unfair competition by prohibiting, *inter alia*, any unlawful or unfair business acts or practices.

188. Within the four years before the filing of this action, MHN committed, and continues to commit, acts of unfair competition, as defined by the UCL, by, among other things, engaging in the acts and practices described herein. MHN's conduct as herein alleged has injured the California Named Plaintiff and California Class members by wrongfully denying them earned wages, and therefore was substantially injurious to the California Named Plaintiff and to California Class members.

189. MHN engaged in unfair competition in violation of the UCL by violating, *inter alia*, each of the following laws. Each of these violations constitutes an independent and separate violation of the UCL:

a. The Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*;

b. California Labor Code § 1194;

c. California Labor Code §§ 201, 202, 203, 226, 226.7, and 512;

d. California Labor Code § 1174; and

e. California Labor Code § 510, which provides in relevant part:

> Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be

> compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.

190. MHN's course of conduct, acts, and practices in violation of the California laws mentioned in the above paragraph constitute a separate and independent violation of the UCL. MHN's conduct described herein violates the policy or spirit of such laws or otherwise significantly threatens or harms competition.

191. The unlawful and unfair business practices and acts of MHN, described above, have injured California Class members in that they were wrongfully denied the payment of earned overtime wages.

192. The California Named Plaintiff, on behalf of herself and the California Class, seeks restitution in the amount of the respective unpaid wages earned and due at a rate of at least one and one-half times the regular rate of pay for work performed in excess of forty hours in a workweek, or eight hours in a day, and double the regular rate of pay for work performed in excess of twelve hours per day.

193. The California Named Plaintiff, on behalf of herself and the California Class members, seeks recovery of attorneys' fees and costs of this action to be paid by MHN, as provided by the UCL and California Labor Code §§ 218, 218.5, and 1194.

SEVENTH CLAIM FOR RELIEF
(California Private Attorneys General Act of 2004, Cal. Lab. Code §§ 2698-2699.5, Brought by the California Named Plaintiff on Behalf of Herself and All Aggrieved Employees)

194. The California Named Plaintiff, on behalf of herself and all aggrieved employees, as well as on behalf of the general public of California, realleges and incorporates by reference paragraphs 1 through 193 as if they were set forth again herein.

195. Under the California Private Attorneys General Act ('PAGA') of 2004, Cal. Lab. Code §§ 2698-2699.5, an aggrieved employee, on behalf of herself and other current or former employees as well as the general public, may bring a representative action as a private attorney general to recover penalties for an employer's violations of the California Labor Code and IWC Wage Orders. These civil penalties are in addition to any other relief available under the California Labor Code, and must be allocated 75% to California's Labor and Workforce Development Agency ('LWDA') and 25% to the aggrieved employee, pursuant to California Labor Code § 2699.

196. The California Named Plaintiff alleges, on behalf of herself and all aggrieved

employees, as well as the general public, that MHN has violated the following provisions of the California Labor Code and the following provisions of the IWC Wage Orders that are actionable through the California Labor Code and PAGA, as previously alleged herein: Cal. Lab. Code §§ 201-03, 218.5, 226, 226.7, 226.8, 510, 512, 1174, 1174.5, and 1194, and IWC Wage Order No. 4-2001. Each of these violations entitles the California Named Plaintiff, as a private attorney general, to recover the applicable civil penalties on her own behalf, on behalf of all aggrieved employees, and on behalf of the general public.

197. California Labor Code § 2699(a), which is part of PAGA, provides in pertinent part:

> Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of themselves or herself and other current or former employees pursuant to the procedures specified in § 2699.3.

198. California Labor Code § 2699(f), which is part of PAGA, provides in pertinent part:

> For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows: . . . (2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation.

199. The California Named Plaintiff is entitled to civil penalties, to be paid by MHN and allocated as PAGA requires, pursuant to California Labor Code § 2699(a) for MHN's violations of the California Labor Code and IWC Wage Orders for which violations a civil penalty is already specifically provided by law. Furthermore, the California Named Plaintiff is entitled to civil penalties, to be paid by MHN and allocated as PAGA requires, pursuant to California Labor Code § 2699(f) for MHN's violations of the California Labor Code and IWC Wage Orders for which violations a civil penalty is not already specifically provided.

200. On January 30, 2013, the California Named Plaintiff provided written notice by certified mail to the LWDA of the legal claims and theories of this case contemporaneous with the filing of the First Amended Complaint in this action. The California Named Plaintiff simultaneously provided a copy of that notice by certified mail to MHN. As of

the date of filing of this complaint, Plaintiffs have not received a response from the LWDA. Because no notice has been 'provided within 33 calendar days of the postmark date of' Plaintiffs' January 30 letter, the California Named Plaintiff is entitled to assert this claim. Cal. Labor Code § 2699.3(a)(2).

201. Under PAGA, the California Named Plaintiff and the State of California are entitled to recover the maximum civil penalties permitted by law for the violations of the California Labor Code and IWC Wage Order No. 4-2001 that are alleged in this complaint.

EIGHTH CLAIM FOR RELIEF
(Hawaii Wage and Hour Law, Haw. Rev. Stat. § 387-1 *et seq.*, Brought by the Hawaii Named Plaintiff on Behalf of Herself and the Hawaii Class)

202. The Hawaii Named Plaintiff, on behalf of herself and all members of the Hawaii Class, realleges and incorporates by reference paragraphs 1 through 201 as if they were set forth again herein.

203. The foregoing conduct, as alleged, violates the Hawaii Wage and Hour Law, Haw. Rev. Stat. § 387-1 *et seq.*

204. At all relevant times, MHN has been, and continues to be, an 'employer' within the meaning of Haw. Rev. Stat. § 387-1. At all relevant times, MHN has employed, and continues to employ, employees, including the Hawaii Named Plaintiff and

each of the Hawaii Class members, within the meaning of Haw. Rev. Stat. § 387-1.

205. Haw. Rev. Stat. § 387-3 requires an employer, such as MHN, to pay overtime compensation to all nonexempt employees. Under Hawaii law, the Hawaii Named Plaintiff and the Hawaii Class members are employees who are not exempt from overtime pay requirements.

206. At all relevant times, Hawaii had a policy and practice of willfully failing and refusing to pay overtime pay to the Hawaii Named Plaintiff and the Hawaii Class members for their hours worked in excess of forty hours per week.

207. As a result of MHN's failure to pay wages earned and due, and its decision to withhold wages earned and due, to the Hawaii Named Plaintiff and Hawaii Class members at a rate of at least one and one-half times the regular rate of pay for work performed in excess of forty hours in a workweek, MHN has violated, and continues to violate, the Hawaii Wage and Hour Law.

208. The Hawaii Named Plaintiffs, on behalf of themselves and the Hawaii Class members, seek recovery of attorneys' fees and costs of this action to be paid by MHN, as provided by Hawaii law, Haw. Rev. Stat. § 388-11(c) and § 387-12(c).

209. The Hawaii Named Plaintiffs, on behalf of themselves and the Hawaii Class members, seek damages in the amount of the unpaid wages earned and due at a rate of at least one and one-half

times the regular rate of pay for work performed in excess of forty hours in a work week, as provided by Haw. Rev. Stat. § 387-3, interest under Haw. Rev. Stat. § 388-10(a) and § 388-11(c), liquidated damages under Haw. Rev. Stat. § 387-12(b), and such other legal and equitable relief from MHN's unlawful and willful conduct as the Court deems just and proper.

NINTH CLAIM FOR RELIEF
(Kentucky Wage and Hour Laws, KRS § 337.010 *et seq.*, Brought by the Kentucky Named Plaintiffs on Behalf of Themselves and the Kentucky Class)

210. The Kentucky Named Plaintiffs, on behalf of themselves and all members of the Kentucky Class, realleges and incorporates by reference paragraphs 1 through 209 as if they were set forth again herein.

211. The foregoing conduct, as alleged, violates the Kentucky Wage and Hour Laws, KRS § 337.010 *et seq.* ('the Kentucky Wage Laws').

212. At all relevant times, MHN has been, and continues to be, an 'employer' within the meaning of KRS § 337.010 and 803 Ky. Admin. Regs. 1:005 § 1(2). At all relevant times, MHN has employed, and continues to employ, employees, including the Kentucky Named Plaintiffs and each of the Kentucky Class members, within the meaning of KRS § 337.010 and 803 Ky. Admin. Regs. 1:005 § 4.

213. The Kentucky Wage Laws require an employer, such as MHN, to pay overtime

compensation to all nonexempt employees. Under Kentucky law, the Kentucky Named Plaintiffs and the Kentucky Class members are employees who are not exempt from overtime pay requirements.

214. At all relevant times, Kentucky had a policy and practice of willfully failing and refusing to pay overtime pay to the Kentucky Named Plaintiffs and the Kentucky Class members for their hours worked in excess of forty hours per week, in violation of the Kentucky Wage Laws, KRS §§ 337.020, 337.060, & 337.285.

215. As a result of MHN's failure to pay wages earned and due, and its decision to withhold wages earned and due, to the Kentucky Named Plaintiffs and the Kentucky Class members at a rate not less than one and one-half times the regular rate of pay for work performed in excess of forty hours in a workweek, MHN has violated, and continues to willfully violate, the Kentucky Wage Laws, KRS §§ 337.055, 337.060, & 337.285.

216. The Kentucky Named Plaintiffs and Kentucky Class members regularly work and have worked in excess of five-hour shifts without being afforded at least a half-hour meal break in which they were relieved of all duty. as required by KRS § 337.355.

217. In addition, the Kentucky Named Plaintiffs and Kentucky Class members regularly work and have worked without being afforded at least one ten-minute rest break, in which they were relieved of all duty, per four hours of work performed

or major fraction thereof, as required by KRS § 337.365.

218. As a result of MHN's failure to record, report, credit, and furnish to each of its MFLCs in Kentucky, including the Kentucky Named Plaintiffs and the Kentucky Class members, their respective wage and hour records showing all wages earned and due for all work performed, MHN has failed to make, keep, preserve, and furnish such records in violation of the Kentucky Wage Laws, KRS §§ 337.070 & 337.320.

219. The Kentucky Named Plaintiffs, on behalf of themselves and the Kentucky Class members, seek recovery of attorneys' fees and costs of this action to be paid by MHN, as provided by Kentucky law, KRS § 337.385(1).

220. The Kentucky Named Plaintiffs, on behalf of themselves and the Kentucky Class members, seek damages in the amount of the unpaid wages earned and due at a rate of at least one and one-half times the regular rate of pay for work performed in excess of forty hours in a work week, liquidated damages under KRS § 337.385(1), punitive damages, and such other legal and equitable relief from MHN's unlawful and willful conduct as the Court deems just and proper.

TENTH CLAIM FOR RELIEF
(Nevada Wage and Hour Law, Nev. Rev. Stat. § 608.005 *et seq.* & § 612.005 *et seq.*, Brought by the Nevada Named Plaintiff on Behalf of Himself and the Nevada Class)

221. The Nevada Named Plaintiff, on behalf of himself and all members of the Nevada Class, realleges and incorporates by reference paragraphs 1 through 220 as if they were set forth again herein.

222. The foregoing conduct, as alleged, violates Nevada wage and hour law, Nev. Rev. Stat. § 608.005 *et seq.*, Nev. Rev. Stat. § 612.005 *et seq.*, Nev. Rev. Stat. § 616A.005 *et seq.*, and Nev. Admin. Code § 608.050 *et seq.*

223. At all relevant times, MHN has been, and continues to be, an 'employer' within the meaning of Nev. Rev. Stat. § 608.011. At all relevant times, MHN has employed, and continues to employ, employees, including the Nevada Named Plaintiff and each of the Nevada Class members, within the meaning of Nev. Rev. Stat. § 612.085, Nev. Admin. Code § 608.155, and Nev. Rev. Stat. Sec. 616A.255.

224. Nev. Rev. Stat. § 608.018 & 608.260 requires an employer, such as MHN, to pay overtime compensation to all nonexempt employees. Under Nevada law, the Nevada Named Plaintiff and the Nevada Class members are employees who are not exempt from overtime pay requirements.

225. At all relevant times, Nevada had a policy and practice of willfully failing and refusing to pay overtime pay to the Nevada Named Plaintiff and the Nevada Class members for their hours worked in excess of forty hours per week.

226. As a result of MHN's failure to pay wages earned and due, and its decision to withhold wages earned and due, to the Nevada Named Plaintiff and Nevada Class members at a rate of at least one and one-half times the regular rate of pay for work performed in excess of forty hours in a workweek, MHN has violated, and continues to violate, the Nevada Wage and Hour Law.

227. Nev. Rev. Stat. § 608.050 requires MHN to pay its employees all wages due within the time specified by law. Nevada law provides that if an employer willfully fails to timely pay such wages, the employer must continue to pay the subject employees' wages until the back wages are paid in full or an action is commenced, up to a maximum of thirty days of wages.

228. The Nevada Named Plaintiff and all Nevada Class members who ceased employment with MHN are entitled to unpaid compensation, but to date have not received such compensation. More than thirty days have passed since the Nevada Named Plaintiff and certain of the Nevada Class members left MHN's employ.

229. The Nevada Named Plaintiffs, on behalf of themselves and the Nevada Class members, seek recovery of attorneys' fees and costs of this action to be paid by MHN, as provided by Nevada law, Nev. Rev. Stat. § 608.140.

230. The Nevada Named Plaintiffs, on behalf of themselves and the Nevada Class members, seek damages in the amount of the unpaid wages

earned and due at a rate of at least one and one-half times the regular rate of pay for work performed in excess of forty hours in a work week, as provided by Nev. Rev. Stat. § 608.018 & 608.260, and such other legal and equitable relief from MHN's unlawful and willful conduct as the Court deems just and proper.

ELEVENTH CLAIM FOR RELIEF
(New Mexico Minimum Wage Act, N.M. Stat. Ann. § 50-4-19 *et seq.*, Brought by the New Mexico Named Plaintiff on Behalf of Himself and the New Mexico Class)

231. The New Mexico Named Plaintiff, on behalf of himself and all members of the New Mexico Class, realleges and incorporates by reference paragraphs 1 through 230 as if they were set forth again herein.

232. The foregoing conduct, as alleged, violates the New Mexico Minimum Wage Act, N.M. Stat. Ann. § 50-4-19 *et seq.*

233. At all relevant times, MHN has been, and continues to be, an 'employer' within the meaning of N.M. Stat. Ann. § 50-4-21(B). At all relevant times, MHN has employed, and continues to employ, employees, including the New Mexico Named Plaintiff and each of the New Mexico Class members, within the meaning of N.M. Stat. Ann. § 50-4-21(C).

234. N.M. Stat. Ann. § 50-4-22(C) requires an employer, such as MHN, to pay overtime compensation to all nonexempt employees. Under

New Mexico law, the New Mexico Named Plaintiff and the New Mexico Class members are employees who are not exempt from overtime pay requirements.

235. At all relevant times, New Mexico had a policy and practice of willfully failing and refusing to pay overtime pay to the New Mexico Named Plaintiff and the New Mexico Class members for their hours worked in excess of forty hours per week.

236. As a result of MHN's failure to pay wages earned and due, and its decision to withhold wages earned and due, to the New Mexico Named Plaintiff and New Mexico Class members at a rate of at least one and one-half times the regular rate of pay for work performed in excess of forty hours in a workweek, MHN has violated, and continues to violate, the New Mexico Minimum Wage Act.

237. N.M. Stat. Ann. § 50-4-9 requires an employer, such as MHN, to maintain true and accurate records of hours worked and wages paid to each employee, including the New Mexico Named Plaintiff and the New Mexico Class members. Such records must be kept on file for at least one year. On information and belief, MHN has failed to maintain and keep such records in accordance with New Mexico law.

238. The New Mexico Named Plaintiff, on behalf of himself and the New Mexico Class members, seeks recovery of attorneys' fees and costs of this action to be paid by MHN, as provided

by New Mexico law, N.M. Stat. Ann. § 50-4-26(C), (D), & (E).

239. The New Mexico Named Plaintiff, on behalf of himself and the New Mexico Class members, seeks damages in the amount of the unpaid wages earned and due at a rate of at least one and one-half times the regular rate of pay for work performed in excess of forty hours in a work week, as provided by N.M. Stat. Ann. § 50-4-22(C), interest, liquidated damages under N.M. Stat. Ann. § 50-4-26(C), and such other legal and equitable relief from MHN's unlawful and willful conduct as the Court deems just and proper.

TWELFTH CLAIM FOR RELIEF
(New York Labor Law, § 650 *et seq.*, § 190 *et seq.*, and 12 N.Y.C.R.R. Part 142, Brought by the New York Named Plaintiffs on Behalf of Themselves and the New York Class)

240. The New York Named Plaintiffs, on behalf of themselves and all members of the New York Class, reallege and incorporate by reference paragraphs 1 through 239 as if they were set forth again herein.

241. The foregoing conduct, as alleged, violates the New York Minimum Wage Act, Labor Law § 650 *et seq.*, the New York Wage Payment Act, Labor Law § 190 *et seq.*, and the supporting Department of Labor Regulations, 12 N.Y.C.R.R. Part 142 (together, the 'New York Labor Law').

242. At all relevant times, MHN has been, and continues to be, an 'employer' within the

meaning of New York Labor Law § 651. At all relevant times, MHN has employed, and continues to employ, employees, including the New York Named Plaintiffs and each of the New York Class members, within the meaning of New York law.

243. The New York Labor Law requires an employer, such as MHN, to pay overtime compensation to all nonexempt employees. Under New York law, the New York Named Plaintiffs and the New York Class members are employees who are not exempt from overtime pay requirements.

244. At all relevant times, New York had a policy and practice of willfully failing and refusing to pay overtime pay to the New York Named Plaintiffs and the New York Class members for their hours worked in excess of forty hours per week.

245. As a result of MHN's failure to pay wages earned and due, and its decision to withhold wages earned and due, to the New York Named Plaintiffs and New York Class members at a rate of at least one and one-half times the regular rate of pay for work performed in excess of forty hours in a workweek, MHN has violated, and continues to violate, the New York Labor Law.

246. The New York Named Plaintiffs, on behalf of themselves and the New York Class members, seek recovery of attorneys' fees and costs of this action to be paid by MHN, as provided by New York Labor Law § 663(1).

247. The New York Named Plaintiffs, on behalf of themselves and the New York Class members, seek damages in the amount of the unpaid wages earned and due at a rate of at least one and one-half times the regular rate of pay for work performed in excess of forty hours in a work week, as provided by New York Labor Law § 663(1), and such other legal and equitable relief from MHN's unlawful and willful conduct as the Court deems just and proper.

THIRTEENTH CLAIM FOR RELIEF
(Spread-of-Hours Compensation, New York Labor Law, Article 19 § 650 *et seq.* and Supporting New York State Department of Labor Regulations, Brought by the New York Named Plaintiffs on Behalf of Themselves and the New York Class)

248. The New York Named Plaintiffs, on behalf of themselves and all members of the New York Class, reallege and incorporate by reference paragraphs 1 through 247 as if they were set forth again herein.

249. New York Named Plaintiffs and New York Class members worked shifts of greater than ten hours without receiving additional 'spread-of-hours' compensation from MHN.

250. The foregoing conduct, as alleged herein, violates the New York Labor Law, and the supporting New York State Department of Labor regulations, including the provisions requiring 'spread-of-hours' pay, which require an employer,

such as MHN, to pay additional 'spread-of-hours' compensation to employees who work shifts of greater than ten hours.

251. At all relevant times, MHN had a policy and practice of failing and refusing to pay 'spread of hours' compensation to the New York Named Plaintiffs and the New York Class members for their shifts of greater than ten hours.

252. As a result of MHN's failure to pay 'spread of hours' compensation to the New York Named Plaintiffs and the New York Class members for their shifts of greater than ten hours, MHN has violated, and continues to violate, the New York Labor Law.

253. The New York Named Plaintiffs, on behalf of themselves and the New York Class members, seek recovery of attorneys' fees and costs of this action to be paid by MHN, as provided by New York Labor Law § 663(1).

254. The New York Named Plaintiffs, on behalf of themselves and the New York Class members, seek the amount of underpayments based on MHN's failure to 'spread of hours' compensation to the New York Named Plaintiffs and the New York Class members for their shifts of greater than ten hours and such relief from MHN's unlawful and willful conduct as the Court deems just and proper.

FOURTEENTH CLAIM FOR RELIEF
(North Carolina Wage and Hour Law, Haw. Rev. Stat. § 387-1 *et seq.*, Brought by the North

Carolina Named Plaintiff on Behalf of Herself and the North Carolina Class)

255. The North Carolina Named Plaintiff, on behalf of herself and all members of the North Carolina Class, realleges and incorporates by reference paragraphs 1 through 254 as if they were set forth again herein.

256. The foregoing conduct, as alleged, violates N.C. Gen. Stat. § 95-25.1 *et seq.* (the 'North Carolina Wage and Hour Act' or 'NCWHA').

257. At all relevant times, MHN has been, and continues to be, an 'employer' within the meaning of the NCWHA, N.C. Gen. Stat. § 95-25.2(5). At all relevant times, MHN has employed, and continues to employ, employees, including the North Carolina Named Plaintiff and each of the North Carolina Class members, within the meaning of the NCWHA, N.C. Gen. Stat. § 95-25.2(4).

258. The NCWHA requires an employer, such as MHN, to pay overtime compensation to all nonexempt employees. Under North Carolina law, including N.C. Gen. Stat. § 95-25.6, the North Carolina Named Plaintiff and the North Carolina Class members are employees who are not exempt from overtime pay requirements.

259. At all relevant times, North Carolina had a policy and practice of willfully failing and refusing to pay overtime pay to the North Carolina Named Plaintiff and the North Carolina

Class members for their hours worked in excess of forty hours per week.

260. As a result of MHN's failure to pay wages earned and due, and its decision to withhold wages earned and due, to the North Carolina Named Plaintiff and North Carolina Class members at a rate of at least one and one-half times the regular rate of pay for work performed in excess of forty hours in a workweek, MHN has violated, and continues to violate, the NCWHA, N.C. Gen. Stat. §§ 95-25.6, 95-25.7, 95-25.7(A), 95-25.8, & 95-25.22.

261. As a result of MHN's failure to record, report, credit, and furnish to the North Carolina Named Plaintiff and the North Carolina Class members, their respective wage and hour records showing all wages earned and due for all work performed, MHN has failed to make, keep, preserve, and furnish such records in violation of N.C. Gen. Stat. §§ 95-25.13 & 95-25.15, and 13 N.C. Admin Code §§ 12.0801-12.0807.

262. The North Carolina Named Plaintiff, on behalf of herself and the North Carolina Class members, seeks recovery of attorneys' fees and costs of this action to be paid by MHN, pursuant to N.C. Gen. Stat. § 95-25.22(d).

263. The North Carolina Named Plaintiff, on behalf of herself and the North Carolina Class members, seeks damages in the amount of the unpaid wages earned and due at a rate of at least one and one-half times the regular rate of pay for work performed in excess of forty hours in a work week,

punitive damages, interest, liquidated damages, and such other legal and equitable relief from MHN's unlawful and willful conduct as the Court deems just and proper.

FIFTEENTH CLAIM FOR RELIEF
(Declaratory Judgment, 28 U.S.C. §§ 2201-2202, Brought by Plaintiffs on Behalf of Themselves and the Class members)

264. Plaintiffs, on behalf of themselves and all Class members, reallege and incorporate by reference paragraphs 1 through 230 as if they were set forth again herein.

265. The arbitration clause is included at the PSTOA, which is nine pages long. A true and correct copy of the PSTOA is attached hereto as Exhibit A. The clause consists of 18 sentences in a single dense paragraph (the 20th of 23 paragraphs in the PSTOA), spanning pages 7-8. The arbitration clause is not set aside visually, such as on a separate page, or in larger or bolded text. There is no requirement that the arbitration clause be separately signed or even initialed.

266. The arbitration clause seeks to strip Plaintiffs and all other MFLCs of federal and state statutory rights.

267. Plaintiffs seek declaratory judgment to avoid uncertainty, risk of damages, chilling effect, waiver of rights and other negative consequences caused by MHN's arbitration clause.

Declaratory judgment will serve a useful purpose in clarifying the parties' legal relations.

268. Absent the requested declaratory judgment, Plaintiffs and other MFLCs will suffer irreparable harm.

269. The issue of enforceability of MHN's mandatory arbitration clause is subject to declaratory judgment. *See Alders v. A.F.A. Corp.*, 353 F. Supp. 654, 657 (S.D. Fla. 1973), *aff'd without op.*, 490 F.2d 990 (5th Cir. 1974) (declaratory relief appropriate in determining the validity of a contract); *Central Hudson Gas. & Elec. Corp. v. Benjamin F. Shaw Co.*, 465 F. Supp. 331, 333 (S.D.N.Y. 1978) (declaratory relief appropriate to determine enforceability of binding arbitration provision).

270. Plaintiffs seek a declaratory judgment that MHN's mandatory arbitration clause is unconscionable and unenforceable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all Class members nationwide, pray for relief as follows:

A. Declaratory judgment that MHN's arbitration clause is unenforceable.

WHEREFORE, Plaintiffs, on behalf of themselves and all members of the Nationwide FLSA Class, pray for relief as follows:

B. Designation of this action as a collective action on behalf of the Nationwide FLSA Plaintiffs (asserting FLSA claims) and prompt issuance of notice pursuant to 29 U.S.C. § 216(b) to all similarly situated members of the FLSA Opt-In Class, apprising them of the pendency of this action, and permitting them to assert timely FLSA claims in this action by filing individual Consent to Sue forms pursuant to 29 U.S.C. § 216(b);

C. Designation of Plaintiffs as Representatives of the Nationwide FLSA Plaintiffs;

D. A declaratory judgment that the practices complained of herein are unlawful under the FLSA;

E. An award of damages, according to proof, including liquidated damages, to be paid by MHN;

F Costs of action incurred herein, including expert fees;

G. Attorneys' fees, including fees pursuant to 29 U.S.C. § 216;

H. Post-judgment interest, as provided by law; and

I. Such other legal equitable relief as this Court deems necessary, just, and proper.

WHEREFORE, each State Law Class Named Plaintiff, on behalf of him- or herself and all

State Law Class members he or she represents, prays for relief as follows:

J. Certification of this action as a class action on behalf of each State Law Class;

K. Designation of each State Law Class Named Plaintiff as Representative of the Class he or she seeks to represent;

L. Designation of Plaintiffs' counsel of record as Class Counsel for each State Law Class;

M. A declaratory judgment that the practices complained of herein are unlawful under applicable state law;

N. Appropriate injunctive and equitable relief, including an order enjoining MHN from continuing its unlawful practices;

O. Appropriate statutory penalties;

P. Appropriate civil penalties;

Q. An award of damages, liquidated damages, and restitution to be paid by MHN according to proof;[2]

R. Pre-judgment and post-judgment interest, as provided by law;

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[2] 2 However, the New York Named Plaintiffs do not seek liquidated damages under the New York Labor Law.

S. Such other injunctive and equitable relief as the Court may deem just and proper; and

T. Attorneys' fees and costs of suit, including expert fees and costs.

Respectfully submitted,

Dated: January 31, 2014 By: /s/ Allen Vaught
Allen Vaught

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Attorneys for Plaintiffs and proposed Class members

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial on all causes of action and claims with respect to which they have a right to jury trial.

Respectfully submitted,

Dated: January 31, 2014 By: /s/ Allen Vaught
Allen Vaught

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Attorneys for Plaintiffs and proposed Class members

CONSULTANT TASK ORDER—For Hourly Provider Services.

This Consultant Task Order ('CTO') is issued by MHN Government Services, Inc. ('MHN') to THOMAS M ZABOROWSKI ('Provider') (collectively, the 'Parties') under the terms and conditions of the Provider Services Task Order Agreement (the 'Agreement') executed between the Parties and in effect on the Date of Task Order Issuance below.

1. a. Consultant Task Order No.: 65044775 MHNGS Ref#: 55745
   b. Professional Provider Name: THOMAS M ZABOROWSKI
   c. Assignment Location: KS-FT. RILEY
   d. Assignment Start 5/31/2011
   e. Assignment End 8/5/2011
   f. Air Travel Departure Date:
   g. Air Travel Return Date:
   h. Lodging Authorization Yes
   Hotel Check in Date: 5/30/2011
   i. Rental Car Approved No
   j. CLIN:[FOR MHNGS USE ONLY]: 0001AB-CONUS-Labor Hours
   k. Hourly Rate: $45.00
   l. Approved Mileage Reimbursement: Yes
   m. Average Hours 50 Per Week
2. Date of Task Order Issuance: 5/9/2011
3. Issued Under MHNGS Contract No: 1406-04-07-CT-T-66523
4. Appendix A forms a part of this CTO and is attached hereto. Appendix A depicts the scope of the ordered Services and terms of payment.

5. All terms, conditions, policies and procedures of the MFLC Provider Manual and Quality Assurance Surveillance Plan form a part of the CTO.

6. The total Ceiling Price under this CTO is estimated to be $42,110.00, inclusive of labor and, if applicable, those non-labor expenses indicted below.

7 Included in this Total Ceiling Price, if indicated by a 'Yes', are the following Non-Labor components. A cost pool of Not-to-Exceed $11,960.00 is established for reimbursement of these non-labor expenses. Provider shall not exceed this Not-to-Exceed amount without prior approval of MHN:

Yes	Per Diem (Meals & Incidental Expenses); and
Yes	Allowable out-of-pocket expenses (not included in Per Diem)

8. If under this CTO no Air Travel is indicated and 'No' is marked for Rental Car, Hotel and/or Per Diem AND this is a USAREC assignment, refer to Appendix Paragraphs 5, 7, 8 and 16 for additional provisions.

9. The Total Ceiling Price is not intended to be a guarantee of payment or an approved allowed amount that the provider may bill under this CTO. Billing and payment are subject to all terms and conditions of the Provider Task Order Agreement, this CTO and the MFLC Provider Manual.

10. All non-labor expenses will be reimbursed to Provider at direct cost; no indirect costs (e.g. G&A), nor profit, will be applied to these billed expenses.

11. Prohibition on Organizational Conflict of Interest: By acceptance of, and performance under, this CTO, Provider agrees to fully comply with and be legally bound by, this clause. The Provider, for the full term of this CTO, shall not refer any military member, nor the member's family member(s), with whom the Provider has either provided counseling, or has otherwise come in contact, as result of this CTO, to the Provider's own private counseling practice, nor to any provider counseling practice in which the Provider has a personal, financial or other particular interest. Any violation of this clause shall constitute an express material breach of this Task Order and the Provider Services Task Order Agreement and shall be subject to immediate termination by MHN without further cause or advance notice.

12. By acceptance of this Task Order, I certify that I have not been debarred, suspended, proposed for debarment, or otherwise declared ineligible, excluded or disqualified by any state or federal department or agency from receiving a contract/subcontract; and I certify that I'm not listed in the Excluded Parties List System (EPLS) found at: http://www.epls.gov/.

13. Task Order Acceptance Process: MHN shall issue the CTO to Provider via email, using the email address Provider has submitted to Professional Relations. Upon receipt of the Task Order, Provider agrees to notify MHN within two (2) business days via email of the Provider's decision to 'decline' all Task Orders issued hereunder. If MHN does not receive such a written declination within two (2) business days, this shall constitute Provider's acceptance of the Task Order and Provider's agreement to performance thereunder.

IN WITNESS WHEREOF, MHN hereto enters into this agreement on the effective date specified. MHN GOVERNMENT SERVICES, INC.

By:
(Authorized Signature)

Title: John L. Roberts
Manager, Health Net Government & Specialty Services

CONSULTANT TASK ORDER
For Hourly Provider Services

APPENDIX A—Hourly Provider Services
TERMS AND LOCATION OF ASSIGNMENT
COVERED BY THIS CTO

1. **Responsibilities of Provider**: Upon acceptance of this CTO, Provider agrees to provide short term, situational, problem solving non-medical counseling Services in support of military personnel and their families at the location and for the time period specified below and in accordance with the Provider Services Task Order Agreement executed between MHN and Provider and all requirements, policies and procedures contained in the MFLC Provider Manual and the MFLC Quality Assurance Surveillance Program. By acceptance of this CTO Provider agrees to provide contracted services in full for the Assignment Period specified below. MHN reserves the right to replace Provider in the event Provider, as solely determined by MHN, is unable to complete the assignment in full.

2. **Responsibilities of MHN**: MHN shall appoint a supervisor that will be responsible for assignments and scheduling, oversight of Services, resolution of all issues, and address Provider's administrative concerns. The Provider will have access to the supervisor as well as the Director of Clinical Programs and, as needed, The Medical Director in order to

address clinically related issues. Note, however, that only authorized representatives of MHN's Contracts and/or Purchasing Departments have authority to make material changes (e.g. changes in price or performance period) to this CTO. MHN shall compensate Provider in accordance with the terms and conditions of the Provider Services Task Order Agreement and this Task Order.

3. **Assignment Period**: The Assignment Start Date and Assignment End Date as specified under paragraph 1(d) and 1(e) of this Agreement constitutes the Assignment Period.

4. **Termination of Assignment**: The Assignment shall terminate as of the End Date, the effective date of Termination of the Provider Services Task Order Agreement or the date upon which MHN or the Department of Defense ('DoD') determines in their sole discretion that the Provider's Services are not required, whichever occurs earlier. In the event the Provider does not initiate or complete the term of the assignment specified in this CTO for reasons including, but not limited to termination of the Agreement, termination of the assignment by MHN or the DoD, or the declination of the services of the Provider by the DoD, MHN shall only be responsible for reimbursing Provider for the prorated period of time actually worked by Provider. The Assignment may be terminated by MHN prior to the Assignment Start date in accordance with Section 4 of the Provider

Services Task Order Agreement. In the event that MHN cancels this assignment without cause less than five days prior to the Assignment Start Date specified under 1(d), MHN agrees to pay Provider the equivalent of one week's pay based on the Hourly Rate and Average Hours per Week specified under 1(k) and 1(m) respectively of this Task Order.

5. **Air Travel Dates**: Air travel is applicable if so specified under Paragraph 1(f) and 1(g) of this CTO. If applicable, unless mutually agreed upon by both parties, Provider will travel to the Assignment Location on or about the Air Travel Departure Date and return on or about Air Travel Return Date. If air travel is not authorized under Paragraph 1(f) and 1(g) of this CTO above, but this assignment is in support of USAREC, MHN may still authorize air travel as required during the fulfillment of this assignment. Air travel is arranged and paid for by MHN. Air travel expenses paid for by Provider are not reimbursable by MHN.

6. **Reimbursement for mileage when driving a privately owned vehicle (POV)**: Provider will receive reimbursement for mileage for business related travel as approved by MHN. Providers approved for MHN lodging will be reimbursed for mileage for one round trip from their residence to and from the assignment location or mileage reimbursement for a total of 500 miles traveled, whichever is lower. Providers commuting from home or personally arranged

lodging each day are eligible for mileage reimbursement if travel exceeds 50 miles one way as determined by MHN. Reimbursement shall be limited to the Internal Revenue Service mileage rate applicable on the respective days of business travel. Provider agrees that mileage for travel to and from MHN lodging and work each day is not reimbursable.

7. **Rental Cars**: If, as specified under Paragraph 1(i) of this CTO, Provider is approved for a rental car, MHN will arrange for Provider to obtain a rental car for approved business purposes. If a rental car is not authorized under Paragraph 1(i) of this CTO above, but this assignment is in support of USAREC, MHN may still authorize a car rental as required during the fulfillment of this assignment. Provider agrees that any related expenses incurred during personal time will not be reimbursed by MHN. Provider agrees that gas for travel to and from MHN lodging and work each day are not reimbursable. Provider agrees that the collision damage waiver and personal accident insurance will not be taken. Should the Provider elect to purchase Insurance, the full cost shall be the responsibility of the Provider. Additionally, Provider shall not be authorized to designate an additional driver on the company rental car unless the Provider is part of a car sharing arrangement established by MHN.

8. **Reimbursement for Mileage to and From Work**: Only if approved by MHN and indicated under Paragraph 1(l) of the CTO, Provider will receive reimbursement for mileage for travel to and from work. To be eligible for reimbursement, actual mileage must exceed 50 miles each way. Reimbursement shall be limited to the Internal Revenue Service mileage rate applicable on the respective days of travel to and from the assignment.

9. **Hotel and Lodging for Scheduled Overnight Stays**: If, as specified under Paragraph 1(h) of this CTO, MHN shall arrange and pay for all Hotel and Lodging services. If lodging is not authorized in Section 1(h) above, but this assignment is in support of USAREC, MHN may still authorize lodging if (i) the consultant is required to travel to a location other than the Assignment location noted in 1.(c) above, and (ii) when such travel requires an overnight stay. Hotel and Lodging expenses paid for by Provider for scheduled stays are not reimbursable by MHN.

10. **Unscheduled Overnight Stays**: As necessitated by special needs of the assignment and upon prior approval, Provider shall receive reimbursement for overnight lodging and associated meals. This provision is applicable for assignments for which Provider is not receiving a per diem and/or is pre-approved for scheduled Hotel or Lodging.

11. **Payment Rate**: The Provider shall be paid the Hourly Rate specified under Paragraph 1(k) of this CTO. Provider will be paid for only those services performed in accordance with the MFLC Provider Manual and accepted by MHN.

12. **Payment Terms**: Provider will be paid the Hourly Rate for the Professional Provider stated under Paragraph 1(b) for approved hours worked. Provider shall not bill or receive reimbursement for scheduled time during the Assignment Period not worked as a result of holidays, planned or unplanned time-off taken by the Provider or a reduction in the Provider's schedule by the DoD for whatever reason or no reason. Provider is not eligible for compensatory time-off with pay without the express approval of the MHN appointed supervisor. If services provided under this CTO are in support of a Purple Camp or DoDEA Camp, payment will be subject to a Payment Cap as described below

    (a) Purple Camp Payment Cap: The Payment Cap shall be derived by multiplying the number of approved days worked over the course of the assignment times 12 hours times the Hourly Rate.

    (b) DoDEA Camp Payment Cap: Provider will be paid the Hourly Rate for approved hours worked not to exceed 50 hours per 7 consecutive calendar days. Under no circumstances may Provider bill nor will Provider receive an amount greater than

the Payment Cap. It is the responsibility of the Provider to monitor their hours worked under the Purple Camp and DoDEA Camp programs so as not to exceed the maximum number of hours allowed for reimbursement.

13. **Weekly Schedule**: Provider agrees to be available the Average Hours Per Week specified under Paragraph 1(m) of this CTO. Work will routinely be scheduled during normal business hours, but may include evenings and weekends. Provider may be required to provide some form of on call support for surge or redeployment activities.

14. **Invitation Travel Orders**: For assignments outside the U.S., Provider will receive Invitational Travel Orders (ITOs) issued by the Department of Defense. The ITO will serve as Provider's authorization to be on the military installations at the Assignment Locations. Provider may also be issued a military identification card. Provider agrees to carry the ITO, passport and military ID card, if issued, at all times while in the country of Assignment Location. Provider shall return the military identification card to their supervisor if one is issued.

15. **Per Diem**: Payment of Per Diem is applicable to this assignment if indicated by an [X] under Paragraph 7 (a) of this CTO. If applicable, the Provider shall be paid the prevailing daily Meals and Incidental Expenses (M&IE) Per Diem rate as applicable to the Assignment

Location specified under Paragraph 1(c) of this CTO. The intent is that Per Diem is paid in lieu of reimbursement of actual costs of meals and incidental expenses.

(a) For Continental United States 'CONUS' performance: In accordance with (IAW) the Federal Travel Regulations (FTR), issued by the General Services Administration.

(b) For Outside the Continental United States 'OCONUS' performance (excluding Alaska, Hawaii and Guam): IAW Section 925, Supplement to Standardized Regulations, issued by the U.S. Dept. of State.

(c) For Alaska, Hawaii, and Guam: In accordance with the Joint Travel Regulations (JTR), Vol. 2, issued by the Dept. of Defense.

16. **Per Diem**: If this CTO is in support of a USAREC Assignment, and lodging is not authorized in Section 1.h. above, Per Diem will be allowed for those days during the Assignment when: (i) the consultant is authorized by MHN to travel to a location other than the Assignment location noted in 1.(c) above, and (ii) when such travel requires an overnight stay. Travel to other locations not requiring an overnight stay will not be afforded Per Diem allowance.

17. **Per Diem Payment**: If Per Diems are applicable to this CTO, the Per Diem rate is

paid seven days of the week for every day of the Assignment Period. An amount equal to 75% of one day's Per Diem will be paid for one travel day prior to the start of the Assignment and an amount equal to 75% of one day's Per Diem will be paid for one travel day after the end of the Assignment. Except for these two travel days, Per Diem payment does not apply to personal days that occur prior to or following the Assignment Period specified above. The applicable per diem to the Assignment location can be viewed via the following web site: http://www.defensetravel.dod.mil/perdiem/perdiemrates.html

18. **Invoice and Expense Submissions.** Provider is required to submit invoices and expense reports every other week, for partial delivery of services, at the end of each billing period in which the services were performed. For each CTO, the invoice and expense report must separately breakout billings for each Professional Provider and any related and allowed business expenses. At a minimum, all invoices must include the following details in order to be consider properly prepared and submitted:

    (1) Date of Invoice.

    (2) CTO Number and name of Professional Provider performing the service.

    (3) Amount billed in accordance with directions specified in the CTO for the

applicable Services that the Provider is billing.

(4) Total amount claimed by Provider for the biweekly billing period.

(5) Dates for the biweekly period for which services are being billed.

(6) Copies of receipts for all expenses for which reimbursement is claimed

Provider will submit invoice and expense report to MHN no later than two (2) business days after the end of the biweekly period for which payment is requested in accordance with the billing scheduled provided in the orientation materials and included in the MFLC Provider Manual.

MHN payment on properly prepared and submitted Provider biweekly invoice will be determined on the basis of the pro rata portion of Assignment completed during the biweekly period and the reimbursable and approved expenses claimed for the same biweekly period.

19. **Final invoice**: Provider expressly acknowledges its understanding and agreement, that a Final Invoice must be submitted within thirty (30) calendar days from the Assignment Period End Date as set forth in the CTO, in order to be considered timely submitted. Such Final Invoice shall be so marked, and shall include all previously unbilled amounts, if any. In the event that Provider fails to submit a timely Final Invoice, MHN shall consider the last invoice

submitted by Provider, under the respective CTO, as the Provider's Final Invoice, and once paid by MHN, no further amounts will be considered due nor owed the Provider, and MHN shall have no obligation for further payments. Notwithstanding the foregoing, in the event that MHN denies an invoice submitted after the 30-day deadline on the basis that it was not submitted timely, upon demonstration by Provider of good cause for the delay through the provider dispute resolution process specified in the MFLC Provider Manual, MHN will adjudicate the invoice as if it were timely submitted.

20. **Right of Set-off**: In relation to any collection and payment of monies owed by Provider to MHN, MHN shall have the right, after the 45th calendar day following MHN's submission of the reimbursement request to Provider or after Provider's appeal rights have been exhausted, to set-off any payments owed to Provider against any funds owing by Provider to MHN, provided that MHN submits to Provider an explanation in writing in sufficient details so that Provider can reconcile each invoice.

CONSULTANT TASK ORDER—Fixed Price Services.

This Consultant Task Order ('CTO') is issued by MHN Government Services, Inc. ('MHN') to THOMAS M ZABOROWSKI ('Provider') (collectively, the 'Parties') under the terms and conditions of the Provider Services Task Order Agreement (the 'Agreement') executed between the Parties and in effect on the Date of Task Order Issuance below.

1. a. Consultant Task Order No.: 65037432 MHNGS Ref#: 37266
   b. Professional Provider Name: THOMAS M ZABOROWSKI
   c. Assignment Location: KS-FT. RILEY
   d. Assignment Start 11/19/2010
   e. Assignment End 1/2/2011
   f. Air Travel Departure Date:
   g. Air Travel Return Date:
   h. Lodging Authorization Yes
   Hotel Check in Date: 11/18/2010
   i. Rental Car Approved No
   j. CLIN:[FOR MHNGS USE ONLY]: 0003AA-CONUS-45-Day Rotation
   k. Fixed Price: $12,850.00
   l. Approved Mileage Reimbursement: Yes
2. Date of Task Order Issuance: 10/1/2010
3. Issued Under MHNGS Contract No: 1406-04-07-CT-T-66523
4. Appendix A forms a part of this CTO and is attached hereto. Appendix A depicts the scope of the ordered Services and terms of payment.

5. All terms, conditions, policies and procedures of the MFLC Provider Manual and Quality Assurance Surveillance Plan form a part of the CTO.

6. The total Ceiling Price under this CTO is estimated to be $21,082.00, inclusive of labor and, if applicable, those non-labor expenses indicted below.

7. Included in this Total Ceiling Price, if indicated by a 'Yes', are the following Non-Labor components. A cost pool of Not-to-Exceed $8,232.00 is established for reimbursement of these non-labor expenses. Provider shall not exceed this Not-to-Exceed amount without prior approval of MHN:

Yes	Per Diem (Meals & Incidental Expenses); and
Yes	Allowable out-of-pocket expenses (not included in Per Diem)

8. If under this CTO no Air Travel is indicated and 'No' is marked for Rental Car, Hotel and/or Per Diem AND this is a USAREC assignment, refer to Appendix Paragraphs 5, 7, 8 and 15 for additional provisions.

9. The Total Ceiling Price is not intended to be a guarantee of payment or an approved allowed amount that the provider may bill under this CTO. Billing and payment are subject to all terms and conditions of the Provider Task Order Agreement, this CTO and the MFLC Provider Manual.

10. All non-labor expenses will be reimbursed to Provider at direct cost; no indirect costs (e.g. G&A), nor profit, will be applied to these billed expenses.

11. Prohibition on Organizational Conflict of Interest: By acceptance of, and performance under, this CTO, Provider agrees to fully comply with and be legally bound by, this clause. The Provider, for the full term of this CTO, shall not refer any military member, nor the member's family member(s), with whom the Provider has either provided counseling, or has otherwise come in contact, as result of this CTO, to the Provider's own private counseling practice, nor to any provider counseling practice in which the Provider has a personal, financial or other particular interest. Any violation of this clause shall constitute an express material breach of this Task Order and the Provider Services Task Order Agreement and shall be subject to immediate termination by MHN without further cause or advance notice.

12. By acceptance of this Task Order, I certify that I have not been debarred, suspended, proposed for debarment, or otherwise declared ineligible, excluded or disqualified by any state or federal department or agency from receiving a contract/subcontract; and I certify that I'm not listed in the Excluded Parties List System (EPLS) found at: http://www.epls.gov/.

13. Task Order Acceptance Process: MHN shall issue the CTO to Provider via email, using the email address Provider has submitted to Professional Relations. Upon receipt of the Task Order, Provider agrees to notify MHN within two (2) business days via email of the Provider's decision to 'decline' all Task Orders issued hereunder. If MHN does not receive such a written declination within two (2) business days, this shall constitute Provider's acceptance of the Task Order and Provider's agreement to performance thereunder.

IN WITNESS WHEREOF, MHN hereto enters into this agreement on the effective date specified. MHN GOVERNMENT SERVICES, INC.

By: _____

(Authorized Signature)

Title: John L. Roberts

Manager, Health Net Government & Specialty Services

Date: _____

CONSULTANT TASK ORDER
For Fixed Price Provider Services

APPENDIX A—Fixed Price Provider Services
TERMS AND LOCATION OF ASSIGNMENT
COVERED BY THIS CTO

1. **Responsibilities of Provider**: Upon acceptance of this CTO, Provider agrees to provide short term, situational, problem solving non-medical counseling Services in support of military personnel and their families at the location and for the time period specified below and in accordance with the Provider Services Task Order Agreement executed between MHN and Provider and all requirements, policies and procedures contained in the MFLC Provider Manual and the MFLC Quality Assurance Surveillance Program. By acceptance of this CTO Provider agrees to provide contracted services in full for the Assignment Period specified below. MHN reserves the right to replace Provider in the event Provider, as solely determined by MHN, is unable to complete the assignment in full.

2. **Responsibilities of MHN**: MHN shall appoint a supervisor that will be responsible for assignments and scheduling, oversight of Services, resolution of all issues, and address Provider's administrative concerns. The Provider will have access to the supervisor as well as the Director of Clinical Programs and, as needed, The Medical Director in order to

address clinically related issues. Note, however, that only authorized representatives of MHN's Contracts and/or Purchasing Departments have authority to make material changes (e.g. changes in price or performance period) to this CTO. MHN shall compensate Provider in accordance with the terms and conditions of the Provider Services Task Order Agreement and this Task Order.

3. **Assignment Period**: The Assignment Start Date and Assignment End Date as specified under paragraph 1(d) and 1(e) of this Agreement constitutes the Assignment Period.

4. **Termination of Assignment**: The Assignment shall terminate as of the End Date, the effective date of Termination of the Provider Services Task Order Agreement or the date upon which MHN or the Department of Defense ('DoD') determines in their sole discretion that the Provider's Services are not required, whichever occurs earlier. In the event the Provider does not initiate or complete the term of the assignment specified in this CTO for reasons including, but not limited to termination of the Agreement, termination of the assignment by MHN or the DoD, or the declination of the services of the Provider by the DoD, MHN shall only be responsible for reimbursing Provider for the prorated period of time actually worked by Provider. The Assignment may be terminated by MHN prior to the Assignment Start date in accordance with Section 4 of the Provider

Services Task Order Agreement. In the event that MHN cancels this assignment without cause less than five days prior to the Assignment Start Date, MHN agrees to pay Provider the equivalent of one week's pay based on the Weekly Schedule and payment methodology specified under this Task Order.

5. **Air Travel Dates**: Air travel is applicable if so specified under Paragraph 1(f) and 1(g) of this CTO. If applicable, unless mutually agreed upon by both parties, Provider will travel to the Assignment Location on or about the Air Travel Departure Date and return on or about Air Travel Return Date. If air travel is not authorized under Paragraph 1(f) and 1(g) of this CTO above, but this assignment is in support of USAREC, MHN may still authorize air travel as required during the fulfillment of this assignment. Air travel is arranged and paid for by MHN. Air travel expenses paid for by Provider are not reimbursable by MHN.

6. **Reimbursement for mileage when driving a privately owned vehicle (POV)**: Provider will receive reimbursement for mileage for business related travel as approved by MHN. Providers approved for MHN lodging will be reimbursed for mileage for one round trip from their residence to and from the assignment location or mileage reimbursement for a total of 500 miles traveled, whichever is lower. Providers commuting from home or personally arranged lodging each day are eligible for mileage

reimbursement if travel exceeds 50 miles one way as determined by MHN. Reimbursement shall be limited to the Internal Revenue Service mileage rate applicable on the respective days of business travel. Provider agrees that mileage for travel to and from MHN lodging and work each day is not reimbursable.

7. **Rental Cars**: If, as specified under Paragraph 1(i) of this CTO, Provider is approved for a rental car, MHN will arrange for Provider to obtain a rental car for approved business purposes. If a rental car is not authorized under Paragraph 1(i) of this CTO above, but this assignment is in support of USAREC, MHN may still authorize a car rental as required during the fulfillment of this assignment. Provider agrees that any related expenses incurred during personal time will not be reimbursed by MHN. Provider agrees that gas for travel to and from MHN lodging and work each day are not reimbursable. Provider agrees that the collision damage waiver and personal accident insurance will not be taken. Should the Provider elect to purchase insurance, the full cost shall be the responsibility of the Provider. Additionally, Provider shall not be authorized to designate an additional driver on the company rental car.

8. **Hotel and Lodging for Scheduled Overnight Stays**: If, as specified under Paragraph 1(h) of this CTO, MHN shall arrange and pay for all Hotel and Lodging

services. If lodging is not authorized in Section 1(h) above, but this assignment is in support of USAREC, MHN may still authorize lodging if (i) the consultant is required to travel to a location other than the Assignment location noted in 1.(c) above, and (ii) when such travel requires an overnight stay. Hotel and Lodging expenses paid for by Provider for scheduled stays are not reimbursable by MHN.

9. **Unscheduled Overnight Stays**: As necessitated by special needs of the assignment and upon prior approval, Provider shall receive reimbursement for overnight lodging and associated meals. This provision is applicable for assignments for which Provider is not receiving a per diem and/or is pre-approved for scheduled

10. **Payment Rate**: The Provider shall be paid a Fixed Price specified under Paragraph 1(k) of this CTO. Provider will be paid for only those services performed in accordance with the MFLC Provider Manual and accepted by MHN.

11. **Fixed Price**: Provider will be paid the Fixed Price for the Professional Provider stated under Paragraph 1(b) for the satisfactory performance hereunder. The Fixed Price is not of the time and materials or labor hour type, but rather is a firm fixed price for the Assignment Period specified hereunder. In the event, that Provider performs less than the full services contracted during a standard

workweek for reasons other than a federally recognized holiday, MHN reserves the right to prorate the provider's payment accordingly. Provider is not eligible for compensatory time-off with pay without the express approval of the MHN appointed supervisor. This provision is not intended to connote a time and materials arrangement, but a method by which to adjust payment when actual performance is less than the level of services contracted.

12. **Weekly Schedule**: Work will routinely be scheduled for 40 hours per week during normal business hours, but may include evenings and weekends. Provider may be required to provide some form of on call support.

13. **Invitation Travel Orders**: For assignments outside the U.S., Provider will receive Invitational Travel Orders (ITOs) issued by the Department of Defense. The ITO will serve as Provider's authorization to be on the military installations at the Assignment Locations. Provider may also be issued a military identification card. Provider agrees to carry the ITO, passport and military ID card, if issued, at all times while in the country of Assignment Location. Provider shall return the military identification card to their supervisor if one is issued.

14. **Per Diem**: Payment of Per Diem is applicable to this assignment if indicated by a 'Yes' under Paragraph 7 (a) of this CTO. If

applicable, the Provider shall be paid the prevailing daily Meals and Incidental Expenses (M&IE) Per Diem rate as applicable to the Assignment Location specified under Paragraph 1(c) of this CTO. The intent is that Per Diem is paid in lieu of reimbursement of actual costs of meals and incidental expenses.

(a) For Continental United States 'CONUS' performance: In accordance with (IAW) the Federal Travel Regulations (FTR), issued by the General Services Administration.

(b) For Outside the Continental United States 'OCONUS' performance (excluding Alaska, Hawaii and Guam): IAW Section 925, Supplement to Standardized Regulations, issued by the U.S. Dept. of State.

(c) For Alaska, Hawaii, and Guam: In accordance with the Joint Travel Regulations (JTR), Vol. 2, issued by the Dept. of Defense.

15. **Per Diem**: If this CTO is in support of a USAREC Assignment, and lodging is not authorized in Section 1.h. above, Per Diem will be allowed for those days during the Assignment when: (i) the consultant is authorized by MHN to travel to a location other than the Assignment location noted in 1(c) above, and (ii) when such travel requires an overnight stay. Travel to other locations not requiring an overnight stay will not be afforded Per Diem allowance.

16. **Per Diem Payment**: If Per Diems are applicable to this CTO, the Per Diem rate is paid seven days of the week for every day of the Assignment Period. An amount equal to 75% of one day's Per Diem will be paid for one travel day prior to the start of the Assignment and an amount equal to 75% of one day's Per Diem will be paid for one travel day after the end of the Assignment. Except for these two travel days, Per Diem payment does not apply to personal days that occur prior to or following the Assignment Period specified above. The applicable per diem to the Assignment location can be viewed via the following web site: http://www.defensetravel.dod.mil/perdiem/perdiemrates.html

17. **Invoice and Expense Submissions**. Provider is required to submit invoices and expense reports every other week, for partial delivery of services, at the end of each billing period in which the services were performed. For each CTO, the invoice and expense report must separately breakout billings for each Professional Provider and any related and allowed business expenses. At a minimum, all invoices must include the following details in order to be consider properly prepared and submitted:

    (1) Date of Invoice.
    (2) CTO Number and name of Professional Provider performing the service.

(3) Amount billed in accordance with directions specified in the CTO for the applicable Services that the Provider is billing.

(4) Total amount claimed by Provider for the biweekly billing period.

(5) Dates for the biweekly period for which services are being billed.

(6) Copies of receipts for all expenses for which reimbursement is claimed

Provider will submit invoice and expense report to MHN no later than two (2) business days after the end of the biweekly period for which payment is requested in accordance with the billing scheduled provided in the orientation materials and included in the MFLC Provider Manual.

MHN payment on properly prepared and submitted Provider biweekly invoice will be determined on the basis of the pro rata portion of Assignment completed during the biweekly period and the reimbursable and approved expenses claimed for the same biweekly period.

18. **Final invoice**: Provider expressly acknowledges its understanding and agreement, that a Final Invoice must be submitted within thirty (30) calendar days from the Assignment Period End Date as set forth in the CTO, in order to be considered timely submitted. Such Final Invoice shall be so marked, and shall include all previously unbilled amounts, if any. In the event that Provider fails to submit a timely Final

Invoice, MHN shall consider the last invoice submitted by Provider, under the respective CTO, as the Provider's Final Invoice, and once paid by MHN, no further amounts will be considered due nor owed the Provider, and MHN shall have no obligation for further payments. Notwithstanding the foregoing, in the event that MHN denies an invoice submitted after the 30-day deadline on the basis that it was not submitted timely, upon demonstration by Provider of good cause for the delay through the provider dispute resolution process specified in the MFLC Provider Manual, MHN will adjudicate the invoice as if it were timely submitted.

19. **Right of Set-off**: In relation to any collection and payment of monies owed by Provider to MHN, MHN shall have the right, after the 45th calendar day following MHN's submission of the reimbursement request to Provider or after Provider's appeal rights have been exhausted, to set-off any payments owed to Provider against any funds owing by Provider to MHN, provided that MHN submits to Provider an explanation in writing in sufficient details so that Provider can reconcile each invoice.

CONSULTANT TASK ORDER—For Hourly Provider Services.

This Consultant Task Order ('CTO') is issued by MHN Government Services, Inc. ('MHN') to THOMAS M ZABOROWSKI ('Provider') (collectively, the 'Parties') under the terms and conditions of the Provider Services Task Order Agreement (the 'Agreement') executed between the Parties and in effect on the Date of Task Order Issuance below.

1. a. Consultant Task Order No.: 65038802
   MHNGS Ref#: 47668
   b. Professional Provider Name: THOMAS M ZABOROWSKI
   c. Assignment Location: KS-FT. RILEY
   d. Assignment Start 5/12/2011
   e. Assignment End 5/20/2011
   f. Air Travel Departure Date:
   g. Air Travel Return Date:
   h. Lodging Authorization Yes
   Hotel Check in Date: 5/12/2011
   i. Rental Car Approved No
   j. CLIN:[FOR MHNGS USE ONLY]: 0001AB-CONUS-Labor Hours
   k. Hourly Rate: $50.00
   l. Approved Mileage Reimbursement: Yes
   m. Average Hours 40 Per Week
2. Date of Task Order Issuance: 10/28/2010
3. Issued Under MHNGS Contract No: 1406-04-07-CT-T-66523
4. Appendix A forms a part of this CTO and is attached hereto. Appendix A depicts the scope of the ordered Services and terms of payment.

5. All terms, conditions, policies and procedures of the MFLC Provider Manual and Quality Assurance Surveillance Plan form a part of the CTO.

6. The total Ceiling Price under this CTO is estimated to be $6,573.00, inclusive of labor and, if applicable, those non-labor expenses indicted below.

7. Included in this Total Ceiling Price, if indicated by a 'Yes', are the following Non-Labor components. A cost pool of Not-to-Exceed $2,073.00 is established for reimbursement of these non-labor expenses. Provider shall not exceed this Not-to-Exceed amount without prior approval of MHN:

Yes	Per Diem (Meals & Incidental Expenses); and
Yes	Allowable out-of-pocket expenses (not included in Per Diem)

8. If under this CTO no Air Travel is indicated and 'No' is marked for Rental Car, Hotel and/or Per Diem AND this is a USAREC assignment, refer to Appendix Paragraphs 5, 7, 8 and 16 for additional provisions.

9. The Total Ceiling Price is not intended to be a guarantee of payment or an approved allowed amount that the provider may bill under this CTO. Billing and payment are subject to all terms and conditions of the Provider Task Order Agreement, this CTO and the MFLC Provider Manual.

10. All non-labor expenses will be reimbursed to Provider at direct cost; no indirect costs (e.g. G&A), nor profit, will be applied to these billed expenses.

11. Prohibition on Organizational Conflict of Interest: By acceptance of, and performance under, this CTO, Provider agrees to fully comply with and be legally bound by, this clause. The Provider, for the full term of this CTO, shall not refer any military member, nor the member's family member(s), with whom the Provider has either provided counseling, or has otherwise come in contact, as result of this CTO, to the Provider's own private counseling practice, nor to any provider counseling practice in which the Provider has a personal, financial or other particular interest. Any violation of this clause shall constitute an express material breach of this Task Order and the Provider Services Task Order Agreement and shall be subject to immediate termination by MHN without further cause or advance notice.

12. By acceptance of this Task Order, I certify that I have not been debarred, suspended, proposed for debarment, or otherwise declared ineligible, excluded or disqualified by any state or federal department or agency from receiving a contract/subcontract; and I certify that I'm not listed in the Excluded Parties List System (EPLS) found at: http://www.epls.gov/.

13. Task Order Acceptance Process: MHN shall issue the CTO to Provider via email, using the email address Provider has submitted to Professional Relations. Upon receipt of the Task Order, Provider agrees to notify MHN within two (2) business days via email of the Provider's decision to 'decline' all Task Orders issued hereunder. If MHN does not receive such a written declination within two (2) business days, this shall constitute Provider's acceptance of the Task Order and Provider's agreement to performance thereunder.

IN WITNESS WHEREOF, MHN hereto enters into this agreement on the effective date specified. MHN GOVERNMENT SERVICES, INC.
By:
(Authorized Signature)
Title: John L. Roberts
Manager, Health Net Government & Specialty Services

CONSULTANT TASK ORDER
For Hourly Provider Services

APPENDIX A—Hourly Provider Services
TERMS AND LOCATION OF ASSIGNMENT
COVERED BY THIS CTO

1. **Responsibilities of Provider**: Upon acceptance of this CTO, Provider agrees to provide short term, situational, problem solving non-medical counseling Services in support of military personnel and their families at the location and for the time period specified below and in accordance with the Provider Services Task Order Agreement executed between MHN and Provider and all requirements, policies and procedures contained in the MFLC Provider Manual and the MFLC Quality Assurance Surveillance Program. By acceptance of this CTO Provider agrees to provide contracted services in full for the Assignment Period specified below. MHN reserves the right to replace Provider in the event Provider, as solely determined by MHN, is unable to complete the assignment in full.

2. **Responsibilities of MHN**: MHN shall appoint a supervisor that will be responsible for assignments and scheduling, oversight of Services, resolution of all issues, and address Provider's administrative concerns. The Provider will have access to the supervisor as well as the Director of Clinical Programs and, as needed, The Medical Director in order to

address clinically related issues. Note, however, that only authorized representatives of MHN's Contracts and/or Purchasing Departments have authority to make material changes (e.g. changes in price or performance period) to this CTO. MHN shall compensate Provider in accordance with the terms and conditions of the Provider Services Task Order Agreement and this Task Order.

3. **Assignment Period**: The Assignment Start Date and Assignment End Date as specified under paragraph 1(d) and 1(e) of this Agreement constitutes the Assignment Period.

4. **Termination of Assignment**: The Assignment shall terminate as of the End Date, the effective date of Termination of the Provider Services Task Order Agreement or the date upon which MHN or the Department of Defense ('DoD') determines in their sole discretion that the Provider's Services are not required, whichever occurs earlier. In the event the Provider does not initiate or complete the term of the assignment specified in this CTO for reasons including, but not limited to termination of the Agreement, termination of the assignment by MHN or the DoD, or the declination of the services of the Provider by the DoD, MHN shall only be responsible for reimbursing Provider for the prorated period of time actually worked by Provider. The Assignment may be terminated by MHN prior to the Assignment Start date in accordance with Section 4 of the Provider

Services Task Order Agreement. In the event that MHN cancels this assignment without cause less than five days prior to the Assignment Start Date specified under 1(d), MHN agrees to pay Provider the equivalent of one week's pay based on the Hourly Rate and Average Hours per Week specified under 1(k) and 1(m) respectively of this Task Order.

5. **Air Travel Dates**: Air travel is applicable if so specified under Paragraph 1(f) and 1(g) of this CTO. If applicable, unless mutually agreed upon by both parties, Provider will travel to the Assignment Location on or about the Air Travel Departure Date and return on or about Air Travel Return Date. If air travel is not authorized under Paragraph 1(f) and 1(g) of this CTO above, but this assignment is in support of USAREC, MHN may still authorize air travel as required during the fulfillment of this assignment. Air travel is arranged and paid for by MHN. Air travel expenses paid for by Provider are not reimbursable by MHN.

6. **Reimbursement for mileage when driving a privately owned vehicle (POV)**: Provider will receive reimbursement for mileage for business related travel as approved by MHN. Providers approved for MHN lodging will be reimbursed for mileage for one round trip from their residence to and from the assignment location or mileage reimbursement for a total of 500 miles traveled, whichever is lower. Providers commuting from home or personally arranged

lodging each day are eligible for mileage reimbursement if travel exceeds 50 miles one way as determined by MHN. Reimbursement shall be limited to the Internal Revenue Service mileage rate applicable on the respective days of business travel. Provider agrees that mileage for travel to and from MHN lodging and work each day is not reimbursable.

7. **Rental Cars**: If, as specified under Paragraph 1(i) of this CTO, Provider is approved for a rental car, MHN will arrange for Provider to obtain a rental car for approved business purposes. If a rental car is not authorized under Paragraph 1(i) of this CTO above, but this assignment is in support of USAREC, MHN may still authorize a car rental as required during the fulfillment of this assignment. Provider agrees that any related expenses incurred during personal time will not be reimbursed by MHN. Provider agrees that gas for travel to and from MHN lodging and work each day are not reimbursable. Provider agrees that the collision damage waiver and personal accident insurance will not be taken. Should the Provider elect to purchase Insurance, the full cost shall be the responsibility of the Provider. Additionally, Provider shall not be authorized to designate an additional driver on the company rental car unless the Provider is part of a car sharing arrangement established by MHN.

8. **Reimbursement for Mileage to and From Work**: Only if approved by MHN and indicated under Paragraph 1(l) of the CTO, Provider will receive reimbursement for mileage for travel to and from work. To be eligible for reimbursement, actual mileage must exceed 50 miles each way. Reimbursement shall be limited to the Internal Revenue Service mileage rate applicable on the respective days of travel to and from the assignment.

9. **Hotel and Lodging for Scheduled Overnight Stays**: If, as specified under Paragraph 1(h) of this CTO, MHN shall arrange and pay for all Hotel and Lodging services. If lodging is not authorized in Section 1(h) above, but this assignment is in support of USAREC, MHN may still authorize lodging if (i) the consultant is required to travel to a location other than the Assignment location noted in 1.(c) above, and (ii) when such travel requires an overnight stay. Hotel and Lodging expenses paid for by Provider for scheduled stays are not reimbursable by MHN.

10. **Unscheduled Overnight Stays**: As necessitated by special needs of the assignment and upon prior approval, Provider shall receive reimbursement for overnight lodging and associated meals. This provision is applicable for assignments for which Provider is not receiving a per diem and/or is pre-approved for scheduled Hotel or Lodging.

11. **Payment Rate**: The Provider shall be paid the Hourly Rate specified under Paragraph 1(k) of this CTO. Provider will be paid for only those services performed in accordance with the MFLC Provider Manual and accepted by MHN.

12. **Payment Terms**: Provider will be paid the Hourly Rate for the Professional Provider stated under Paragraph 1(b) for approved hours worked. Provider shall not bill or receive reimbursement for scheduled time during the Assignment Period not worked as a result of holidays, planned or unplanned time-off taken by the Provider or a reduction in the Provider's schedule by the DoD for whatever reason or no reason. Provider is not eligible for compensatory time-off with pay without the express approval of the MHN appointed supervisor. If services provided under this CTO are in support of a Purple Camp or DoDEA Camp, payment will be subject to a Payment Cap as described below.

    (a) Purple Camp Payment Cap: The Payment Cap shall be derived by multiplying the number of approved days worked over the course of the assignment times 12 hours times the Hourly Rate.

    (b) DoDEA Camp Payment Cap: Provider will be paid the Hourly Rate for approved hours worked not to exceed 50 hours per 7 consecutive calendar days. Under no circumstances may Provider bill nor will Provider receive an amount greater than

the Payment Cap. It is the responsibility of the Provider to monitor their hours worked under the Purple Camp and DoDEA Camp programs so as not to exceed the maximum number of hours allowed for reimbursement.

13. **Weekly Schedule**: Provider agrees to be available the Average Hours Per Week specified under Paragraph 1(m) of this CTO. Work will routinely be scheduled during normal business hours, but may include evenings and weekends. Provider may be required to provide some form of on call support for surge or redeployment activities.

14. **Invitation Travel Orders**: For assignments outside the U.S., Provider will receive Invitational Travel Orders (ITOs) issued by the Department of Defense. The ITO will serve as Provider's authorization to be on the military installations at the Assignment Locations. Provider may also be issued a military identification card. Provider agrees to carry the ITO, passport and military ID card, if issued, at all times while in the country of Assignment Location. Provider shall return the military identification card to their supervisor if one is issued.

15. **Per Diem**: Payment of Per Diem is applicable to this assignment if indicated by an [X] under Paragraph 7 (a) of this CTO. If applicable, the Provider shall be paid the prevailing daily Meals and Incidental Expenses (M&IE) Per Diem rate as applicable to the Assignment

Location specified under Paragraph 1(c) of this CTO. The intent is that Per Diem is paid in lieu of reimbursement of actual costs of meals and Incidental expenses.

(a) For Continental United States 'CONUS' performance: In accordance with (IAW) the Federal Travel Regulations (FTR), issued by the General Services Administration.

(b) For Outside the Continental United States 'OCONUS' performance (excluding Alaska, Hawaii and Guam): IAW Section 925, Supplement to Standardized Regulations, issued by the U.S. Dept. of State.

(c) For Alaska, Hawaii, and Guam: In accordance with the Joint Travel Regulations (JTR), Vol. 2, issued by the Dept. of Defense.

16. **Per Diem**: If this CTO is in support of a USAREC Assignment, and lodging is not authorized in Section 1.h. above, Per Diem will be allowed for those days during the Assignment when: (i) the consultant is authorized by MHN to travel to a location other than the Assignment location noted in 1.(c) above, and (ii) when such travel requires an overnight stay. Travel to other locations not requiring an overnight stay will not be afforded Per Diem allowance.

17. **Per Diem Payment**: If Per Diems are applicable to this CTO, the Per Diem rate is

paid seven days of the week for every day of the Assignment Period. An amount equal to 75% of one day's Per Diem will be paid for one travel day prior to the start of the Assignment and an amount equal to 75% of one day's Per Diem will be paid for one travel day after the end of the Assignment. Except for these two travel days, Per Diem payment does not apply to personal days that occur prior to or following the Assignment Period specified above. The applicable per diem to the Assignment location can be viewed via the following web site: http://www.defensetravel.dod.mil/perdiem/perdiemrates.html

18. **Invoice and Expense Submissions.** Provider is required to submit invoices and expense reports every other week, for partial delivery of services, at the end of each billing period in which the services were performed. For each CTO, the invoice and expense report must separately breakout billings for each Professional Provider and any related and allowed business expenses. At a minimum, all invoices must include the following details in order to be consider properly prepared and submitted:

    (1) Date of Invoice.

    (2) CTO Number and name of Professional Provider performing the service.

    (3) Amount billed in accordance with directions specified in the CTO for the

applicable Services that the Provider is billing.

(4) Total amount claimed by Provider for the biweekly billing period.

(5) Dates for the biweekly period for which services are being billed.

(6) Copies of receipts for all expenses for which reimbursement is claimed

Provider will submit invoice and expense report to MHN no later than two (2) business days after the end of the biweekly period for which payment is requested in accordance with the billing scheduled provided in the orientation materials and included in the MFLC Provider Manual.

MHN payment on properly prepared and submitted Provider biweekly invoice will be determined on the basis of the pro rata portion of Assignment completed during the biweekly period and the reimbursable and approved expenses claimed for the same biweekly period.

19. **Final invoice**: Provider expressly acknowledges its understanding and agreement, that a Final Invoice must be submitted within thirty (30) calendar days from the Assignment Period End Date as set forth in the CTO, in order to be considered timely submitted. Such Final Invoice shall be so marked, and shall include all previously unbilled amounts, if any. In the event that Provider fails to submit a timely Final Invoice, MHN shall consider the last invoice submitted by Provider, under the respective

CTO, as the Provider's Final Invoice, and once paid by MHN, no further amounts will be considered due nor owed the Provider, and MHN shall have no obligation for further payments. Notwithstanding the foregoing, in the event that MHN denies an invoice submitted after the 30-day deadline on the basis that it was not submitted timely, upon demonstration by Provider of good cause for the delay through the provider dispute resolution process specified in the MFLC Provider Manual, MHN will adjudicate the invoice as if it were timely submitted.

20. **Right of Set-off**: In relation to any collection and payment of monies owed by Provider to MHN, MHN shall have the right, after the 45th calendar day following MHN's submission of the reimbursement request to Provider or after Provider's appeal rights have been exhausted, to set-off any payments owed to Provider against any funds owing by Provider to MHN, provided that MHN submits to Provider an explanation in writing in sufficient details so that Provider can reconcile each invoice.

MHN

GOVERNMENT SERVICES

MILTARY AND FAMILY LIFE CONSULTING SERVICES (MFLC)

PROVIDER MANUAL

July 15, 2011

Version 6.11

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MILITARY AND FAMILY CONSULTING SERVICES (MFLC) MANUAL

SECTION 1—BACKGROUND AND CURRENT STATUS OF MILITARY AND FAMILY CONSULTING SERVICES (MFLC) PROGRAM

1.1 General Overview of MFLC Program

The Department of Defense (DoD) has long recognized that service to our nation places a heavy demand on families. DoD is committed to supporting military families and recognized an emerging need to provide informal support to Service members and their families in addition to the existing counseling support services at military installations, Thus DoD established a program to provide short term, situational, problem-solving non-medical counseling services. This non-medical counseling is designed to address issues that occur specifically within the military lifestyle and help Service members and their families cope with the normal reactions to the stressful/adverse situations created by deployments and reintegration. For some of the younger Service Members and especially those who are newly married, the stresses may occur as part of military living and the potential of deployment and support services may help solidify their relationship.

The MFLC program was piloted under the name Military Family Life Consultant in 2004 to meet a specific need of providing support to families of extended 1st Armored Division Soldiers. The success of the program in United States Army Europe

(USAREUR) has resulted in the expansion of MFLC services DoD wide for all Military Services CONUS and OCONUS and National Guard and the Reserve Component. Since May 2006, the Office of Family Policy (OFP) has contract oversight and each Service has a designated Point of Contact (POC). The MFLC program delivery may vary in the military services to meet specific needs and mission requirements; however all program delivery must remain within the scope of care and the Office of the Secretary of Defense (OSD) contract.

The majority of the MFLC positions are rotational, up to 90 days. There are some non-rotational positions as well as the 'Coaching for Young Families' pilot program initiative that will be a one-year time limited initiative. The OSD contract in collaboration with the services and MHN Government Services (MHN) remains flexible to ensure services are provided when and where they are needed, and to especially serve National Guard and Reserve Component Service Members and their families who often feel isolated and do not live near military installations.

The MFLC program is an OSD contract intended to augment existing military support services and meet emerging needs for the active duty, National Guard and Reserve Component Service Members and their families through the cycles of deployment and reintegration back to their families and communities.

1. 2 Service Delivery and Scope

The consultant program assists Service Members and families in dealing with relationships, crisis intervention, stress management, family issues,

parent-child communications, family separations as well as reunions and reintegration due to deployments. The consultant program will also assist military members and families who are volunteering their support for military communities and families (i.e., Family Readiness Group Leaders, Family Support Volunteers). This consultant program is an integral part of military and family support programs that are targeted to assure that personal and family issues do not detract from operational readiness, to strengthen individuals by assisting them in the problem-solving process and to increase individual and family member competencies and confidence in the ability to handle the stressors of military life. Addressing those issues impacting ability to function places Service Members and their families in a better position to deal with the stresses they are experiencing.

Psycho-education is provided to Service Members and their families to help them understand the impact of stress, deployments, family reunions following deployments and the stresses of the military lifestyle. The educational goal is to teach Service Members and their families how to anticipate and deal with problems such as deployment stress, how to recognize the signs of potential impact on personal functioning and when to obtain medical assistance. Consultants provide psycho-educational presentations as requested for installation based services and National Guard and Reserve Component drill weekends and family events. Consultants use military and contractor approved presentations.

- Counseling services are delivered by licensed clinical practitioners who are credentialed by MHN.

- Service delivery may be provided both on and off the military installations within the civilian community, but it will not be provided in military Medical Treatment Facilities (MTFs).). MFLCs will not meet in a residence unless it is for a meeting (such as a support group or presentation to spouses) held at an individual's residence. As a rule of thumb, *MFLCs must not meet in a client's home.*
- Counseling services consist of face-to-face counseling, outreach/awareness services and educational services provided on a short-term rotational basis to meet the need.
- Consultants provide clients with non-medical problem identification counseling services. Services can be delivered in individual, couple, family and group counseling settings to address relationships, crisis intervention, stress management, grief after loss, occupational and other individual and family issues requiring problem solving assistance. Types of counseling and psycho-educational group topics include but are not limited to:

Life Skills:
Anger management
Assertiveness/Communication
Conflict resolution
Decision making
Parenting
Parent/child communication
Self esteem/confidence
Social issues
School/Work grades
Values/Life meaning

Military Lifestyle:
Deployment stress
Relational problems
Emotional well being
Individuation/Sense of self
Loss and grief
Coping skills
Separation
Homesickness
Relocation adjustment
Reintegration
Relationship Issues

- All groups must be psycho-educational. Consultants cannot facilitate therapeutic groups or provide therapy.
- With the exception of mandatory state, federal and military reporting requirements (i.e., domestic violence, child abuse, and duty to warn situations) this problem-solving counseling is private and confidential to encourage the widest level of participation.
- Situations meeting the diagnostic criteria for the most common mental disorders found in the Diagnostic and Statistical Manual of Mental Disorders - Fourth Edition (DSM-IV) must be referred to military medical mental health care providers, TRICARE or other providers of professional mental health care.
- Counseling support will also be provided through referral for up to twelve sessions throughout the United States to meet the needs of the Service Members and family members (within 30

minutes of where the family lives). Service Members and family members can call the toll free number directly (888-774-1361) to obtain a referral.

- OSD has partnered with Department of Defense Education
  Association (DoDEA) to provide MFLC services in the DoDEA schools to children, staff and parents.
- MFLC consultants are licensed professional clinical practitioners and can provide a variety of services to include but not limited to meeting the planes of returning Service Members, attending Family Readiness Group meetings, assisting Child and Youth Program and DoDEA staff and children, working with chaplains, attending and presenting at Welcome events (INDOCs) and Town Hall meetings, etc.
- MFLC consultants are sponsored by Service installation designated POCs who will ensure that the consultant can access installation facilities.
- The majority of the services are provided as outreach and 'walk around' counseling support.

1.3 Eligibility and Program Limitations

U.S. troops and family members and individuals on the installation or military-sponsored off-site event are eligible for MFLC services. However, military members or their dependents who are actively being seen through military Social Work Services, Behavioral Health Clinic, Mental Health Clinic, Family Advocacy Program or Sexual Assault Response Coordinator (SARC) are described as being 'in the system.' Service Members who are in the system must seek services from the military program with which he or she is already involved. Additionally if a client is involved in any investigation being conducted by the Military Police (MPs), Judge Advocate General (JAG) or the Command this individual is 'in the system '. Those currently in the system (that is, currently working with Behavioral Health, Chaplain, etc) must seek services from the military program with which they are already involved. (**Note that this does not apply to those who have been specifically referred for additional non-medical support *by the program with which they are working.)*

Note that persons who are currently undergoing investigation or have been involved in any investigation conducted by the Military Police (MPs), Judge Advocate General (JAG) or the Command within the last six months are also considered 'in the system'. However, this does not include Air Force Personnel For Air Force, those who have been under investigation at any time are considered 'off limits' for MFLC services. *Remember that potential clients should be advised of our parameters prior to any consultation.*

1.4 MFLC Consultant Role and Responsibilities

Every formal contact should result in an action plan to address the presenting issues. Consultants are not working as traditional therapists and should not use clinical and diagnostic terminology. Further, because this is a consulting (rather than therapist) role, licensure in the state of assignment is not required for offsite consultations.

1.4.1 Consultant Primary Role

- Informally assess the needs of the individual, family or group seeking services
- Facilitate venting/story-telling
- Provide support
- Assist with identifying options
- Offer skill-building tools
- Assist with problem-solving
- Provide brief interventions utilizing a short-term, solution-focused approach
- Suggest appropriate resources
- Provide coaching

1.4.2 Additional duties

- Conducting briefings about the MFLC program to commands and spouse support groups.
- Providing educational presentations on topics such as conflict resolution, grief, stress, parenting, pre-deployment, reunion and reintegration issues.
- Attending Family Readiness Group (FRG) meetings and other support meetings.
- Providing outreach to key military personnel to establish relationships and describe the program.

- Providing management consultations and support to Command representatives on personnel issues.
- Providing support for In-processing and Out-processing activities.
- Attend command or department staff meetings, Town Hall meetings.

1.4.3 On-Call Duties

Consultants are prohibited from assuming on-call procedures normally provided by Medical, Life Skills or Family Advocacy, as consultants are not credentialed for this type of duty. Consultants may be called upon to assist with surge activities. If on call duties are required the Area Coordinator (AC) and/or Army Community Services Officer (ACSO) will advise the consultant and outline the appropriate procedures.

1.4.4 Primary Issues

Consultants will encounter a variety of issues, but most are related to the impact of multiple deployments. Stressors associated with deployment can exacerbate typical family and relationship problems.

Issues may include:
- Grief and loss
- Anger issues
- Relationship issues with spouse and children
- Adjustment challenges associated with residing in a foreign country

- Stress related symptoms
- Adjustment issues related to deployment and/or returning from 'down range'
- Child and adolescent issues such as:
    - Stress regarding separation from parent/s
    - Concerns regarding safety of parent/s

1.4.5 Action Plans

An essential goal of MFLC service is to assist the Service Member and/or family members in developing action plans to address problems.

Individuals with more serious mental health issues (requiring longer term intervention) are referred—formally or informally—to the appropriate mental health resources. Formal referrals or recommendations are defined as referrals in which the consultant assists the client in establishing contact with a specific resource. Informal recommendations may be offered, such as supplying a number of possible resource options which clients may access independently.

1.4.6 Client Briefing

Prior to a formal consultation, consultants must review the following five points which describe the parameters of the program:

1. Consultants provide brief solution-focused problem solving support (a behavioral action plan).
2. Consultants work in support of and in conjunction with existing military entities/services.

3. Consultants keep no records.

4. Consultants cannot see clients who are 'in the system'.

5. Consultants maintain a Duty to Warn obligation.

Consultants should review and utilize the DoD approved Informed Consent Script:

Informed Consent All Branches: 'Before we begin, I'd like to briefly describe this service. In partnership with the (mention appropriate Service), we help service members and their families with a variety of issues. These can include concerns regarding emotional well being, parenting, as well as other issues affecting you and your family. Information you provide to me or other consultants will be kept confidential, except to meet legal obligations or to prevent harm to self or others. Legal obligations include requirements of laws and DoD or military regulations. Harm to self or others includes suicidal thought or intent, a desire to harm oneself, domestic violence, child abuse or neglect, violence against any person, and any present or future illegal activity. Do you have any questions about what I have just explained?'

Air Force Only: For the Personnel Reliability Program (PRP) certified members, reporting any concerns related to reliability is also required.

SECTION 2—MFLC PROGRAMS

2.0 Four Delivery Service Models of the MFLC programs

Outreach/Rotational ('Rotational'): Services are delivered by consultants both on and military installations within the civilian community, but never in the Medical Treatment Facilities (MTFs). Services consist of face-to-face counseling, outreach/awareness services and educational services provided on a short-term rotational basis to meet need. Rotational counseling also includes short-term specialized programs such as the DoDEA and CYP Summer Enrichment Program that operates during the summer months to support summer school, camps and summer child and youth programs DoD-wide.

On-Demand: Services include non-medical counseling support and psycho-educational presentations which cover a variety of topics including deployment and reintegration, communication, and grief and loss. These services are primarily for drill weekends and family events for the National Guard and Reserve Component. On-demand events include support for Service Members and family members and may also include activities for children.

Counseling Referral: Counseling Referral services are provided by MHN practitioners in a private office and could include up to twelve sessions (as authorized by MHN—primarily for

National Guard and Reserve Component members and their families).

Full-time Counseling: Services are delivered by full-time consultants who are hired by MHN and placed on the military installation. Full time consultants work in a social service delivery program model.

The scope of this manual is primarily intended to cover the service delivery and administrative requirements for consultants contracted to provide Rotational and On-Demand counseling.

2.2 Overview of Rotational Counseling Programs outside the Continental United States (OCONUS)—Excluding Hawaii, Alaska and Puerto Rico

2.2.1 Europe Community Team

Areas Served: The OCONUS Europe Community Team provides services to military members and their families in Germany, the Netherlands, Belgium, Italy, Spain, Norway and Portugal.

Population Served: Military personnel including Active Duty, Reserve, Family members, and individuals on the installation or present at events.

Length of Assignments: OCONUS assignments fall under three categories:
A-Team 30 days
B-Team 45 days
C-Team 45 days

All assignment teams overlap with incoming consultants to minimize burdens on the ACS Staff related to consultant orientation and provide for a seamless transition and increased continuity.

Service begins with a teleconference call held prior to consultant departure from the states. Upon arrival into Frankfurt, consultants attend a two day Orientation (conducted by the Europe-based MHN Manager and Area Coordinators) before they are sent to assignment locations.

Work Setting: The work setting can vary widely. Formal consultations may occur in Family Services Centers (FSC) offices. More informal encounters may occur in community meeting locations and other nontraditional settings. However, consultants are not allowed to meet in client's homes.

A key element of this program is that consultants are visible in the community and connect with military personnel and family members wherever there is a need. In this way, the consultants can reach those who might otherwise not seek help.

Work Schedule:

- Team members will be scheduled for a 40-hour week and may be required to provide after hours and weekend availability. It is the intent of the European team to schedule team members with 2 days off per week. It is conceivable that some of the team may be asked to provide some form of On-Call support or respond to surge or redeployment activities during unscheduled hours.

- On scheduled days off, consultants are free to travel or use the time as they choose. All of the installations have Army Community Service (ACS) centers and local travel information is available there. The consultant must inform the AC by E-Mail of weekend plans and appropriate contact info (name/address of hotel, etc.).

Supervision and Oversight: Consultants work under the supervision of an MHN Area Coordinator (AC) and an Army Community Services Officer (ACSO). The ACs are responsible for the overall clinical and administrative leadership for the MFLC team. Area Coordinators provide weekly, mandatory supervision regarding clinical and administrative issues, making sure that consultants are operating within the parameters of the program and providing quality services to military members and families. Among the responsibilities of the ACs:

- Identify and address team member clinical performance concerns.
- Consult and advise on all administrative issues for team members.
- Counsel/advise team members on appropriate adjustments to behavior in and around the military installations as it may impact the team's effectiveness.

ACs have ongoing contact with consultants through on-site visits, telephone consultations and E-Mail. ACs also provide coaching, education and information updates, which are disseminated to consultants either through MHN or through the

Installation Management Agency in Europe (IMA-E) Office.

ACs further assure that services provided are in keeping with expectations of the ACSO and consistent with the Statement of Work (SOW) as outlined by the OSD.

The ACSO at each location will provide oversight and be available for questions. The ACSO will make all day-to-day assignments in the designated community.

2.2.2 Air Force in the Pacific (PACAF)

Areas Served: The Pacific Rim including Japan, Korea (see 2.2.3), Guam, Alaska and Hawaii

Population Served: Airmen, their dependents and support staff

Length of Assignment: 60 days per rotation

Work Setting:
The work setting can vary widely. Formal consultations may occur in FSC offices. More informal encounters may occur in community meeting locations. The key to this program is for the consultants to be visible in the community and connect with military personnel and family members wherever there is a need. In this way, the consultants can reach those who might otherwise not seek help.

Note: Consultants are not allowed to meet with clients in the client's home.

Work Schedule:
The designated POC will provide day-to-day supervision of the consultant schedule. The consultant is contracted on the basis of 40 hours per week but is not limited to an 8-hour day. Situations and/or meetings, briefings and appointments may extend daily work hours. Every effort will be made to give the consultant two consecutive days off each week. If the consultant is required to work beyond a 40-hour workweek this must be discussed and approved in advance by the MHN supervisor. Consultants are available to MHN 24 hours a day, seven days a week for potential surge or redeployment activities; consultants who will travel more than 2 hours driving time from the installation must notify the MHN supervisor prior to departure.

Supervision and Oversight:
The consultant's daily work activities are coordinated by the designated POC. MHN's supervisor provides program and clinical oversight via telephone, E-Mail and conference calls. The MHN supervisor provides mandatory, weekly supervision via telephone to address clinical and administrative issues, making sure the consultants are operating within the parameters of the program and providing quality services to military members and families. When a consultant receives a request to provide a service that is outside those normally provided by the consultant, the consultant is to contact the MHN supervisor for approval. All

educational groups or trainings must be previewed and approved by the POC and MHN's management team.

Service to Children and Department of Defense Dependent Schools (DoDDS): Policy guidance provided by PACAF Headquarters states:

- Consultants may NOT provide consultation services at/inside DoDD schools. Consultants may deliver briefings about services to DoDDs faculty, but only at the request of the faculty.
- Consultants may, however, provide consultation services to school age children at an appropriate helping agency location (meaning at the Family Center, Youth Center, etc). Parental consent is required for consultation school age children. Parental consent is also required for observation of children/adolescents.
- Consultants will pass all parental consent forms to POCs for appropriate filing.

2.2.3 Korea Team

Areas Served: Army installations in Korea.

Population Served: Military personnel including Active Duty, Reserve, Family members, and individuals on the installation or present at events.

Length of Assignment: 60 days per rotation. All assignment teams overlap with incoming consultants to minimize burdens on the ACS Staff

related to consultant orientation and provide for a seamless transition and increased continuity.

Work Setting:
The work setting can vary widely. Formal consultations may occur in ACS offices. More informal encounters may occur in community meeting locations. The key to this program is for the consultants to be visible in the community and connect with military personnel and family members wherever there is a need. In this way, the consultants can reach those who might otherwise not seek help.

NOTE: Consultants are not allowed to meet with clients in the client's home.

Work Schedule:
The designated POC will provide day-to-day supervision of the consultant schedule. The consultant is contracted on the basis of 40 hours per week but is not limited to an 8-hour day. Situations and/or meetings, briefings and appointments may extend daily work hours. Every effort will be made to give the consultant two consecutive days off each week. If the consultant is required to work beyond a 40-hour workweek this must be discussed and approved in advance by the MHN supervisor. Consultants are available to MHN 24 hours a day, seven days a week for potential surge or redeployment activities; consultants who will be more than 2 hours driving time from the installation must notify the MHN supervisor prior to departure.

Supervision and Oversight:
All consultants will be working under supervision of a MHN supervisor and the local ACS Officer or other military POC. The ACS Officer or other military POC will provide oversight to address day-to-day duties and scheduling issues. The MHN supervisor provides mandatory, weekly supervision via telephone regarding clinical and administrative issues, making sure the consultants are operating within the parameters of the program and providing quality services to military members and families. All consultants are required to attend weekly supervision calls regardless of length of time spent in a particular location. Other responsibilities include:

- Identify and address consultant performance concerns
- Consult and advise on all administrative issues for MFLC team
- Counsel/advise team members on appropriate behavioral adjustments in and around the military installations

2.3 Overview of Continental United States Rotational Counseling Programs (CONUS) and Alaska, Hawaii and Puerto Rico

Areas Served: The CONUS MFLC Program provides services to military members and their families in the contiguous U.S., Alaska, Hawaii and Puerto Rico.

Population Served:

- Military personnel including Active Duty and Activated Guard and Reserve

- Family members

Length of Assignments: The consultant is assigned to a specific military installation to provide services on an ongoing basis. Assignments are rotational up to 90 days depending on the needs of the installation and nature of the assignment.

Work Setting:
The work setting can vary widely. Formal consultations may occur in Family Service Center (FSC) offices and Airmen and Family Readiness Centers (A&FRC). At some Joint Bases, the terms may be different, such as War Fighter Readiness Family Center or War Fighter Family Support Center. It is important that you confirm the name of the location you may be supporting. More informal encounters may occur in community meeting locations and other non-traditional settings. The key to this program is for the consultants to be visible in the community and connect with military personnel and family members wherever there is a need. In this way the consultants can reach those who might otherwise not seek help.
NOTE: Consultants are not allowed to meet with clients in the client's home.

Work Schedule: The schedule will be determined by the needs of the FSC /A&FRC Director/Flight Chief and the availability of the consultants. The MHN supervisor will coordinate with the consultants and the FSC/A&FRC regarding the schedule. Some evenings and weekends may be required depending on the needs of the installation.

Consultants on assignments distant from home are free to travel or use their time as they choose on their scheduled days off provided that they are not on-call for surge and deployment activities. If on-call they must be reachable by cell and must remain within reasonable distance from the assignment. Consultants should inform the MHN supervisor and the local FSC/A&FRC Director Officer or other military POC by E-Mail of their weekend plans and any contact info (name/address of hotel, etc.).

Supervision and Oversight:
All consultants will be working under supervision of a MHN supervisor and the local FSC/A&FRC Director officer or other military ROC, The FSC Officer/A&FRC Director or other military POC will provide oversight to address day-to-day duties and scheduling issues. The MHN supervisor provides mandatory, weekly supervision via telephone regarding clinical and administrative issues, making sure the consultants are operating within the parameters of the program and providing quality services to military members and families. All consultants are required to attend the weekly supervision calls regardless of how long they have been assigned to the location. Other responsibilities include:

- Identify and address consultant performance concerns
- Consult and advise on all administrative issues for MFLC team
- Counsel/advise team members on appropriate behavioral adjustments in and around the military installations

2.4 Department of Defense Education Activities (DoDEA) Program and Child & Youth Programs (CYP) Summer Enrichment Program

Areas Served: Programs are conducted with all of the service branches.

- CONUS - Only in CYP, including Puerto Rico
- OCONUS - Europe (Germany, Italy, Belgium, Spain, Portugal), Japan, Guam

Population Served: Faculty, staff, parents and children in the DoDEA school system and CYP programs. Programs are conducted with all of the service branches.

Length of Assignment: Generally 60 days

Description of Services:

- Address short-term problem resolution for issues such as school adjustment, deployment and reunion adjustments, and parent-child communications, Issues can also be described as 'normal reactions to abnormal/adverse situations' which typically are exacerbated by the stress imposed on individuals, families and children by the military life style.
- Support faculty, staff, parents and children in the DoDEA school system and CYP programs. Also provide support for Deployment Reintegration and Reunion Activities.

Primary Issues:
The primary focus is on issues children face regarding the deployment of one or both parents. Consultants

also have the opportunity to provide support to parents and staff. Issues are varied and can include:

- Deployment and reintegration issues
- Coping with change
- Stress management
- Parenting skills
- Behavioral management techniques
- Parent-child communications
- Anger management
- Resolving conflicts
- Bullying
- Self-esteem

Work Setting:
For consultants participating at a DoDEA school, all interactions with children, families and school staff will occur at the school, including working in the classroom and in a private office. For those consultants participating in CYP, interactions will occur at the CYP facility during the program hours and at some non-traditional work settings, such as summer camps and field trips.

Work Schedule:
The work schedule is typically Monday through Friday though consultants may be asked to work in the evenings or weekends depending on need.

- DoDEA Mornings
- CYP Depending on the location, CYP programs can be all day or afternoons only.

Supervision and Oversight:
All team members work under the supervision of a MHN supervisor, AC (in Europe only) and their designated POC. The MHN supervisor provides

mandatory, weekly supervision via telephone to address clinical and administrative issues, making sure the consultants are operating within the parameters of the program and providing quality services to military members and families. If the site only supports CYP, the POC will be at CYP; if the consultant is assigned to DoDEA in the morning, a POC will be available at the school. The POCs at each location will provide oversight and be available for questions. POCs will make all day-to-day assignments in the designated community.

2.5 'Operation Purple' Camps

Summer camps may or may not be identified as 'Operation Purple' Camps depending on whether the camp receives funding through a National Military Family Association (NMFA) grant from the. Summer camps that receive NMFA funding are part of the 'Operation Purple' Camp system and are free to military families of all service branches. 'Operation Purple' (and other) Camps are held in both CONUS and OCONUS locations. To be eligible to participate, consultants must have experience working with children.

Areas Served:

- CONUS - Contiguous U.S,
- OCONUS Europe, Pacific Rim, Alaska, Hawaii and Puerto Rico

Population Served: 'Operation Purple' Camps support the emotional needs of children of military families whose parent(s) is, has been, or will be deployed

and who are attached to active duty, guard, or reserve units.

Length of assignments: Usually one to two weeks

Primary Issues:
The primary focus of this work is with children facing emotional issues related to the deployment of either or both parents and with the family related issues that result. Typical issues include but are not necessarily limited to:

- Deployment and integration issues
- Missing parents
- Fear for parent's safety
- Confusion over changing roles in family
- Lack of support/understanding in their communities and schools
- Coping with change
- Stress management
- Improving communication skills
- Anger management
- Conflict resolution
- Self esteem issues

Work Setting:
For consultants assigned to summer camp, all interactions with campers will occur within the confines of the camp, Interactions may be informal (such as interacting with children during participation in camp activities) or on a more structured basis (such as facilitating groups or meeting with children apart from the group as requested by camp staff). Consultants may also provide information/skills to camp counselors on

recognizing when someone is having an emotional problem.

Work Schedule:
Since children remain at camp 24 hours a day, the work schedules are very flexible and can vary from day to day. The schedule is determined by the needs of the location and coordinated between the consultant and the POC.

Supervision and Oversight:
Consultants work under the supervision of an MHN clinical liaison/supervisor/AC and an on-site military POC. The MHN supervisor provides mandatory, weekly supervision via telephone to address clinical and administrative issues making sure the consultants are operating within the parameters of the program and providing quality services to military members and families. The military POC will provide oversight regarding day-to-day duties and scheduling issues. Line of Sight rules apply at all times (refer to Section 6.11).

2.6 On-Demand Counseling Services

Area Served: CONUS, Puerto Rico, Alaska and Hawaii

Population Served: National Guard and Reserve Members and their families

Length of Assignment: One to two days and primarily on weekends

Primary Issues: Issues related to pre-deployment and reintegration or rapid response services for traumatic events.

Work Setting: Drill centers or an off-site event at a hotel or conference center.

Work Schedule: Services are generally for 4-8 hours during the day.

Supervision and Oversight: Consultants work under the supervision of the MHN clinical liaison and an on-site military POC.

SECTION 3—PREPARATION AND TRAINING

MHNGS offers comprehensive training resources to assure that consultants filling assignments are fully prepared. This 'assignment readiness' supports your success as a consultant as well as the success of the MFLC program.

Required Online Training (Section 3.1) describes the MFLC role and the parameters of MFLC Service delivery. Program specific training offers additional information and tools for assignments in Child and Youth, USAREC, and JFSAP programs. Branch-specific training educates consultants in the rank, insignia, and important elements of each branch's culture.

Note that the training modules listed in Section 3.1.1 are required of all consultants who participate in the MFLC Network. Modules listed under 3.1.2 and 3.1.3 are also required prior to assignment with a given program and/or branch. Consultants are contractually obliged to complete pre-assignment training. *Consultants who fail to complete required training will not be selected for assignment and may be terminated from program participation.*

The Pre Assignment Information Packet and Onsite Training are addressed in sections 3.2 and 3.3.

3.1 Required Online Training

Assignment readiness assures your success as a consultant as well as the success of the MFLC program.

MHNGS offers comprehensive resources to assure that all consultants filling assignments are fully prepared.

Your required training will assist you in understanding your role and the parameters of MFLC Service delivery, including details about our models of service delivery. Program specific training will give you information and tools for assignments in Child and Youth, USAREC, and JFSAP programs. Branch-specific training prepares consultants to work with each branch of service prior to assignment.

3.1.1 Training Required for ALL Consultants

Listed below you will find the minimum training required for participation in the program.

Consultants who have not completed these modules are not eligible to be considered for assignments.

Training required for all Consultants includes critical program information, including role definition, parameters of the program, general information about military environments, MHNGS policies and procedures, guidelines about specific situations, and overall ins and outs of service delivery. This section also includes Presentation Skills training, which will prepares Consultants to deliver presentations--an essential part of the MFLC role.

TRAINING REQUIRED FOR ALL CONSULTANTS		
Training Title	**Frequency/ Timing**	**Description**
General Orientation Training and Exam	Prior to first assignment and again annually	This training familiarizes Consultants with the MFLC program, including the history of the program, an overview of the military environment, MFLC roles and responsibilities, policies and procedures, program parameters and program administration. *Note that this module includes an exam; To pass the exam you must score at least 80%.*

TRAINING REQUIRED FOR ALL CONSULTANTS		
Training Title	**Frequency/ Timing**	**Description**
MFLC Duty to Warn Training and Exam	Prior to first assignment and again annually	This training describes Duty to Warn protocols. Duty to Warn training applies to all programs, including CYS and adult. A duty to warn Resource Guide is also available through the LMS. *Note that this module includes an exam. To pass the exam you must score at least 80%.*

TRAINING REQUIRED FOR ALL CONSULTANTS		
Training Title	**Frequency/ Timing**	**Description**
MFLC Activity form updates - June 2009	Prior to first assignment and again annually	Activity Form submission is a MFLC Program requirement. This training provides detailed information about the Activity Form and the importance of accurate and timely reporting. Scenarios for additional education are also supplied.

TRAINING REQUIRED FOR ALL CONSULTANTS		
Training Title	**Frequency/ Timing**	**Description**
MLC - MCS Course v4 (Military Culture Sensitization) and Exam v4.a	One time prior to first assignment	This is a general overview of military culture and customs, chain of command, rank and insignia, service branch structure and issues affecting military and family members. *Note that this module includes an exam. To pass the exam you must score at least 80%.*

TRAINING REQUIRED FOR ALL CONSULTANTS		
Training Title	**Frequency/ Timing**	**Description**
MFLC - Provider Manual and Exam	One time prior to first assignment	This manual is designed to provide MFLCs with complete background information on the MFLC program, including administrative processses, policies and procedures. *Note that this module includes an exam. To pass the exam you must score at least 80%.*

TRAINING REQUIRED FOR ALL CONSULTANTS		
Training Title	**Frequency/ Timing**	**Description**
MFLC - Presentation Skills	On Demand - prior to first assignment and every 6 months thereafter. All other Consultants - required prior to first assignment and again annually.	Presentations Skills training focuses on three key elements that differentiate standard presentations from powerful ones: presentation, the presenter, and the audience.

3.1.2 Program-Specific Required Training:

These modules are required for consultants filling program specific assignments.
The list includes CYS, Summer Camp/Summer Enrichment, Schools, and JFSAP. If you regularly fill assignments in any of these programs, you should take or refresh your training immediately.
Otherwise, you need not complete these modules unless/until you are scheduled for a CYS or Schools assignment.

Only consultants filling Summer Camp and Summer Enrichment assignments should take these orientations.

PROGRAM SPECIFIC REQUIRED TRAINING		
Training Title	**Frequency/ Timing**	**Description**
MFLC – CYS Program Self-Paced Module and Exam	Prior to first CYS assignment and again annually	This module provides an overview of the CYS program. The training reviews work settings, typical MFLC activities, and ways to support children, staff and parents. *Note that this module includes an exam. To .ass the exam you must score at least 80%.*

PROGRAM SPECIFIC REQUIRED TRAINING		
Training Title	**Frequency/ Timing**	**Description**
MFLC -CYS School Program Manual and Exam	Prior to first CYS assignment and again annually	This module reviews the roles and responsibilities of consultants on school assignments, including review of interactions with military children, their parents, and school personnel. *Note that this module includes an exam. To pass the exam you must score at least 80%.*

PROGRAM SPECIFIC REQUIRED TRAINING		
Training Title	**Frequency/ Timing**	**Description**
MFLC CYS Summer Camps Orientation and exam	One time per summer prior to assignment	This training is designed to familiarize consultants with CYS Summer Camps. *Note that this module includes an exam. To pass the exam you must score at least 80%.*

PROGRAM SPECIFIC REQUIRED TRAINING		
Training Title	**Frequency/ Timing**	**Description**
MFLC - CYS Summer Enrichment Orientation and exam	One time per summer prior to assignment	This training is designed to familiarize consultants with the DoDEA Summer Enrichment program *Note that this module includes an exam. To pass the exam you must score at least 80%.*

3.1.3 Branch Specific Required Training

You should complete this training prior to filling any assignment with a given branch of service.

If you regularly fill assignments with a given branch of service, you should complete or refresh the associated training immediately. Otherwise, you need not complete branch-specific modules until you are scheduled for an assignment with that branch.

BRANCH SPECIFIC REQUIRED TRAINING		
Training Title	**Frequency/ Timing**	**Description**
MFLC Air Force Culture Manual and Exam	One time prior to first Air Force assignment	This manual provides an overview of Air Force culture, covering Air Force customs, ranks, acronyms and terminology and services that support the Air Force. *Note that this module includes an exam. To pass the exam you must score at least 80%.*

BRANCH SPECIFIC REQUIRED TRAINING		
Training Title	**Frequency/ Timing**	**Description**
MFLC Air Force Orientation	One time prior to first Air Force assignment	This module is required in addition to the Air Force Culture Manual and Exam. Air Force Orientation gives consultants concrete information about what to expect during Air Force assignments, as well as further detail about AF Installations and rank structure. Vignettes from MFLCs filling AF assignments are included to further orient consultants to working with the AF population.

BRANCH SPECIFIC REQUIRED TRAINING		
Training Title	**Frequency/ Timing**	**Description**
MFLC Army Culture Manual and Exam	One time prior to first Army assignment	This manual provides an overview of Army culture, covering Army customs, ranks, acronyms and terminology and services that support the Army. *Note that this module includes an exam. To pass the exam you must score at least 80%.*

BRANCH SPECIFIC REQUIRED TRAINING		
Training Title	**Frequency/ Timing**	**Description**
MFLC - Navy Culture Manual and Exam	One time prior to first Navy assignment	This manual gives an overview of Navy culture, including navy traditions and values. This module also reviews specific terminology and organizational structure. *Note that this module includes an exam. To pass the exam you must score at least 80%.*

BRANCH SPECIFIC REQUIRED TRAINING		
Training Title	**Frequency/ Timing**	**Description**
MFLC Marine Corps Culture Manual and Exam	One time prior to first Marines assignment	This manual gives an overview of Marine culture including the core values of Marines, their mission, rank structure and identifying insignias. *Note that this module includes an exam. To pass the exam you must score at least 80%.*

3.1.4 Additional 'live' training

After selection for assignment, Professional Relations or Field Operations staff will contact the consultant with information about any further training necessary for assignment preparation. Further training may be delivered through teleconference or webinar.

3.2 Pre Assignment Information Packet

Prior to an assignment, Field Operations will send the consultant an information packet applicable to that assignment. The packet will include materials

such as the assignment-specific Tip Sheet and other installation information needed for the assignment.

3.3 On-Site Training

3.3.1 OCONUS

- **Europe Community Teams:** All consultants will attend a mandatory on-site orientation ('Inbrief') in Frankfurt, Germany. The military POC and MHN personnel conduct the orientation. Consultants who are new to the program will be assigned to work with an experienced consultant during their assignment.

- **PACAF Teams:** Previous consultants will fully orient new consultants to the specific site during two-day overlap in assignments.

3.3.2 CONUS including Alaska, Hawaii and Puerto Rico

Consultants who are new to the program will be assigned to work with an experienced consultant and/or MHN supervisor during the initial phase of the assignment.

3.3.3 On Demand

The MHN supervisor will provide a phone in-service to all consultants prior to each On-Demand event. Consultants who are new to the program will be assigned to work with an experienced consultant or MHN supervisor on their first On-Demand assignment.

Note that all On Demand consultants must complete the online MFLC Presentation Skills training module prior to the first On Demand Assignment, and every six months thereafter.

SECTION 4—QUALITY ASSURANCE

4.1. Quality Assurance Surveillance Plan

The MFLC Program Quality Assurance Surveillance Plan (QASP) will assist the government in assuring that the prime contractor for this effort performs as required under the awarded task order and the members of the Armed Forces receive the requisite quality of support they need and deserve. The QASP details how and when the government will survey, observe, test, sample, evaluate, and document contractor performance according to the Statement of Work (SOW).

Maintaining high standards of service is crucial to the MFLC Program. MHN has developed a QASP that provides a system for:

- Establishing and maintaining standards of quality and safety
- Measuring outcome and user/participant satisfaction
- Monitoring and improving the performance of consultants
- Providing a process for grievances and complaints

4.2 User/Participant Satisfaction

Data from the following instruments will be reported to the QASP Committee who will monitor overall

program satisfaction as well as satisfaction with individual consultants.

4.2.1 POC Evaluation

POCs will be asked to evaluate the consultants providing services and give feedback regarding overall satisfaction with the MFLC Program. MHN will provide the POCs with evaluation forms and satisfaction feedback forms that can be submitted electronically or via fax or mail. The POCs will also be provided with the opportunity to give their evaluation and feedback directly to the Program Director/Manager via telephone.

4.2.2 Supervisor/Area Coordinators Evaluation

MHN supervisors and ACs will evaluate and track each consultant's performance.

4.2.3 Consultant Evaluation

Each consultant will be asked to evaluate and provide feedback on his or her experiences with the MFLC Program anonymously through electronic survey.

4.3 Credentialing

In accordance with the QASP, all consultants must be credentialed and remain in good standing with the MHN Credentialing Program. Failure to comply with credentialing requirements may result in immediate termination from the DoD network. Therefore, any changes in consultant contact information/ mailing address must be communicated immediately to MHN Professional Relations.

MHN will contact all Consultants regarding information needed and timelines for recredentialing.

Consultants must respond to all requests for recredentialing information.
Once all required recredentialing materials have been received, Consultants will be contacted *only* if a problem arises.
MHN's credentialing requirements are available for review on our web site, at **www.mhn.com**. (Section 4 of the MHN Commercial Provider Manual). For questions regarding credentialing, or to communicate changes in demographic information, consultants should contact Professional Relations at (800) 541-3353.

SECTION 5—CONSULTANT ADMINISTRATIVE RESPONSIBLITIES

5.1 Notice of Information Change

Consultants are required to notify MHN if their mailing, practice or vendor information changes. Such changes should be directed to Professional Relations by phoning (800) 541-3353. Changes to payment or vendor information for Rotational and On-Demand assignments as it pertains to invoices and expense reports should be reported to Professional Relations via e-mail, at **mflc.program@healthnet.com**.

5.2 Contractual Obligations

5.2.1 Contractual Agreements

- Contractual requirements for all aspects of Rotational and On-Demand assignments are outlined in the **Provider Task Order Agreement** and this manual. Consultants are contractually bound by both the Agreement and this manual.

- Requirements specific to each Rotational On-Demand assignment are included in the **Consultant Task Order** (CTO) issued by MHN.
- All consultant reporting requirements are covered in this manual.

5.2.2 Required Documents and Forms

- **Executed Signature Page of Provider Services Task Order Agreement: (PSTOA):** Consultants who have not signed and returned the signature page of the **PSTOA** to Professional Relations may not deploy for assignment. Execution of the Agreement covers all future assignments unless terminated in accordance with the terms of the Agreement.
- **Consultant Task Order (CTO):** For Rotational and On-Demand assignments Professional Relations will issue a CTO to the consultant establishing the terms and conditions of the specific assignment. Consultants must notify MHN via e-mail within 2 business days if declining the CTO. If this written notice is not sent within appropriate time frames, the consultant has accepted the CTO and has agreed to deliver the services specified in the CTO.
- **Supplier Business Questionnaire (SBQ):** This document provides relevant business and tax related information required for vendor set up on the MHN system. This document is required but need only be submitted once unless there is a change in the business relationship.
- **Business Associate Agreement:** HIPAA required document, submitted only once.

- **Electronic Funds Transfer (EFT) Forms:** Forms needed to set up direct deposit. Direct deposit is encouraged but not mandatory. Once direct deposit is initiated the Consultant should allow up to two pay cycles before it goes into effect.
- **W-9:** Required tax document. Information on this form must align with tax information provided on the CTO and SBQ.
- **Copy of Passport:** Copy of passport is required in preparation of travel arrangement to international assignments. Additionally, this passport information is used in preparation for installation access.
- **Completed Emergency Contact Sheet:** Provides MHN with information needed in the event of emergency as well as relevant information needed in preparation for installation access.

5.3 Assignment Availability

Consultants should use the following link to submit availability information to the program:
MFLC Availability Survey

SECTION 6—GENERAL POLICIES AND PROCEDURES

Adherence to the policies listed below is required as a condition for continued participation in the MFLC network. A consultant may direct questions about any of the following policies and procedures to the assigned MHN supervisor while on assignment. (Consultants who are not on assignment may direct questions to MHN Professional Relations; mflc.program@healthnet.com)

6.1 Activity Form

It is also critical that MFLCs filling assignments appropriately document services provided through the program. This is done through submission of the Activity Form.

The Activity Form collects data for utilization reports that MHNGS provides to DoD. Activity Form data also assists us in determining current and future staffing needs, so it is imperative that the information be accurate. Military & Family Life Consultants may provide direct, indirect or informal support to Service Members and their families. It is important to understand the differences between direct, casual, and indirect activities.

Direct Support: Applies when the MFLC assists an individual, couple or family in dealing with an issue by coaching, problem solving or providing education or emotional support. As part of completing the Activity Form, the consultant is asked to provide the presenting issue and action plan.

Indirect Support: Applies when the MFLC conducts informal and formal briefings about the program with individuals, groups or staff, attends a community event or other gathering ('Event Outreach'), conducts a presentation/training or facilitates a group discussion. Indirect Support services may also be delivered in situations where a consultant attends a meeting or event and supports the installation's support structures (Command Support). Services are considered Informal Support if the consultant takes it upon him/herself to make contact with Service Members and families, delivering informal (not scheduled) outreach in a variety of settings. When there are multiple Military & Family Life Consultants present at an Event or

Outreach, each MFLC should complete and submit an Activity Form for the Event activity but divide the total number of participants amongst them and count their own contacts individually. **Casual Support** is a direct type of activity where contact is made through a 'walk up' or phone conversation with a Military Family Life Consultant (MFLC) and a brief exchange is conducted; MFLC interaction with the individual is limited. This type of contact does not fit the more formal and extensive ***direct support*** contact consultation. Confer with your supervisor if you have specific questions regarding casual support.

Submission of complete and accurate Activity Forms for all reportable activity is a requirement for continued participation in the program. Activity Forms must be completed online daily, or within 48 hours of service delivery. The Activity Form is located on the home page of **www.mhngs.com** and instructions for completing each field are embedded in online form. Please review the instructions on line frequently as changes may occur.

To access **www.mhngs.com**, consultants must first register on the Provider Portal at **www.mhn.com**; the user name and password will be the same for both Web Sites. For questions about registering or using either Web Site, please contact **professional.relations@mhn.com** or call 800-541-3353.

6.2 Assignments

6.2.1 Location

MHN staff and military POCs determine the location of all consultant assignments. Assignments are subject to change at any time.

6.2.2 Assignment Extensions for Business Purposes

Consultants who are interested in extending assignment travel dates beyond the contract end date should contact the MHN supervisor. Extensions are made at the discretion of MHN staff and military POCs. Depending on the needs of the assignment location, a consultant may be asked by MHN to extend an assignment, however, this is strictly voluntary; consultants are not required to extend. **Note:** In general, Consultants may not remain at any location longer than 90 days without a break. (Embedded assignments may be an exception to this rule.) Consultants may seek a separate assignment during the break.

6.3 Code of Conduct on and off the Installation

MHN has specific policies regarding behavior and professionalism of consultants while on an installation and while on assignment or under contract to provide services. Policies are listed below. In general, while on assignment consultants are considered to be representatives of the U.S. Government in addition to being representatives of MHN. Therefore, consultant personal conduct is expected to be extremely professional at all times. *Consultants are expected to abide by Code of Conduct/Corporate policies and to maintain professional decorum while on assignment and during assignment periods. Failure to do so (as determined by MHN at its sole discretion) may result in termination from the assignment and possibly the program.*

6.4 Confidentiality Standards

6.4.1 Consultants should maintain industry standards regarding confidentiality at all times. Since this program is 'off the record,' no administrative or clinical records of contact with military members or their families should be kept. Any notes kept must be shredded and discarded immediately. Electronic files should not be saved on Government computers under any circumstances. In addition, consultants should avoid socializing with military staff at the installation.

6.5 Conflicts of Interest

- Consultants are prohibited from accepting or giving any gratuities to/from military or civilian personnel or family members. This includes money, gifts, meals, etc.
- Consultants are prohibited from referring Service Members or their families to their private practice or their group practice under any circumstance.
- Consultants are prohibited from giving any gratuities or gifts to MHN employees.

6.6 Dress Code

The dress code is in effect during all assigned working hours.

Consultant attire should be neat, clean and pressed, and should fall under one of the following general categories:

- Business attire
- Business casual attire including casual slacks, polo shirts, sweaters and blouses

Attire not allowed:

- Jeans and tennis shoes
- Athletic wear (jogging suits or exercise clothing)

- Beachwear (tank, strapless or halter tops and shorts)
- Clothing with offensive language and/or symbols
- Revealing or frayed/torn clothing
- Rubber beach shoes, 'flip flops'
- Any clothing with language or slogans promoting any political or professional organizations (if in doubt, leave it out!)
- *Any* jewelry in facial piercing. (Facial piercing violates military dress code)

6.7 Duty To Warn

Consultants should refer to the online Duty to Warn Resource Guide for up-to-date protocols. The Duty to Warn Resource Guide may be accessed under *Resources* at **www.mhngs.com.**

In general, exceptions to confidentiality are dictated by military guidelines and include the following:

- Harm to Self
- Harm to Others
- Domestic Violence
- Child Abuse
- Present or future illegal activity
- Violence against another person

It is up to the consultant to confirm duty to warn procedures at each location and to obtain contact information for the Sexual Assault Response Coordinator (SARC), FAP MPs and/or other appropriate urgent/emergent community resources. Urgent/emergent situations should be reported to MPs, Security Forces or civilian police as appropriate. All duty to report situations must be reported to the MHN supervisor or AC immediately.

All CONUS Consultants are responsible for making an independent report to the local Child Protective Agency and FAP (Family Advocacy Program) for Child Abuse Duty to Warn situations. Consultants should obtain the name of agency personnel and case file number if available and provide this information to the MHNGS supervisor. For Domestic Violence situations, the consultant must make an independent report to FAP. Consultants are to provide any demographic information related to DTW situations to supervisors by phone. For assignments outside the United States, please consult with your supervisor regarding appropriate resources for child abuse and domestic violence situations as resources may differ. Consultants do not keep written records. Consultants will receive instructions from the MHN supervisor regarding reporting requirements to MHN. (See 'Record Keeping' section below.)

6.8 E-mail

Consultants may not include names of Service Members or their family members when sending information by e-mail. Consultants should use discretion when sending e-mail messages to family, friends, colleagues, etc, about their assignment. Such e-mails could be forwarded to a variety of media sources and could be distributed without the consultant's knowledge.

6.9 Holidays and Sick Days

Unless specified in the CTO, consultants are not paid for holidays and sick days.

6.10 Rental Cars

If an assignment requires air travel, a rental car will be authorized. In cases where driving distance to the assignment is more than 50 miles, a rental car *may*

be authorized (if associated costs are determined by MHN to be less than mileage reimbursement or the cost of air transportation.) If Consultant is authorized for a rental car, this will be indicated in the CTO. If a rental car is not authorized in the CTO, but the assignment is in support of a US Army Recruiting Command assignment ('USAREC'), MHN may still authorize a car rental as required during the fulfillment of this assignment.
For On Demand events *only*, if the consultant resides more than 50 miles (each way) from the service location, MHN will waive the rental car requirement (if less costly than mileage reimbursement) and will authorize mileage if the consultant is contacted for the event less than 2 days prior to the start date and is unable to both pick-up the rental car and reach the event on time.

The travel department is responsible for booking the best option for a rental car and generally includes a small to mid-sized vehicle. Standard transmission cars are reserved for all OCONUS assignments. *(Note that consultants must be proficient driving a standard transmission to be eligible for OCONUS assignments.)*
Consultant agrees that any related expenses incurred during personal time will not be reimbursed by MHN.
Provider agrees that the collision damage waiver and personal accident insurance will not be taken. Should the Consultant elect to purchase insurance, the full cost shall be the responsibility of the Consultant. Additionally, Provider shall not be authorized to designate an additional driver on the company rental car.

Consultants should not transport clients, their family members or military personnel in vehicles leased by MHN. Only MHN personnel or MHN contracted personnel can be transported in vehicles rented by MHN.

6.11 Line of Sight

Consultants are not to meet alone with a child or a group of children without being in the line of sight with no barriers of the child/children's parent/s or the military POC or the POC's designated staff. If the child and the consultant are within view of the child's parents or military supervisor through an open window or door this is considered acceptable to the 'no barrier' rules. Consultants are never to be in a supervisory position with a child or a group of children.

6.12 Media

- **Consultants are prohibited from talking to/giving interviews to the media about assignments or about the MFLC program.** This restriction includes interviews or comments to local newspapers, school or church newsletters or bulletins, radio or T.V. stations.
- This restriction applies to the media both in and outside of the U.S. and is expressly included in the Provider Services Task Order Agreement.
- Consultants are prohibited from any publication by any means related to:
    - Any MFLC program information
        - Specific information related to assignments, locations, clients seen, or MFLC activities

- Personal opinions about persons or functions related to an MFLC assignment; opinions of colleagues or any other person about MFLC services or program.

- Consultants are prohibited from discussing or disseminating *any* information about the MFLC Program through seminars or workshops and/or web sites, articles, books, blogs, social networking sites, bulletin boards, surveys or any other medium.
- Violation of any part of this policy is grounds for termination from the MFLC network.

6.13 On-Call Duties

Consultants are prohibited from assuming on-call procedures normally provided by Medical, Life Skills or Family Advocacy, as MFLCs are not credentialed for this type of duty. The MHN supervisor and/or military POC will advise the consultant if he/she must be available to respond to surge or redeployment activities.

6.14 Policy on Related Consultants

Consultants who are related (spouse, sibling, etc.) will not be assigned to the same location.

6.15 Politics

- Consultants are expected to refrain from engaging in any political discussions with military members and their families or civilian staff either on or off the installation.
- It is against regulations for military personnel to talk against any elected official. Military personnel are unwilling to engage in any political conversations and will be uncomfortable if a consultant attempts to do so.

- Strict adherence to this restriction is required for participation in this program.

6.16 Promotional Materials

All promotional materials, such as brochures and business cards, will be provided by the installation. Consultants who are asked by the military POC to create any type of promotional materials should contact the MHN supervisor.

6.17 Record Keeping

Since contacts with military personnel and family members are off the record, there are no clinical or administrative records kept on individuals or groups with whom the consultant has contact. Consultants are not to keep any written record of consultations (with the exception of the Activity Form, which is anonymous).

Any informal notes kept must be shredded within 24 hours. Consultants must not save electronic files on military computers under any circumstances.

6.18 Restricted Reporting

Restricted reporting means that any (active duty) victim of sexual assault or active duty family member or intimate partner victim of domestic abuse can contact identified individuals for assistance without triggering a military investigation or command notification. The purpose of Restricted Reporting directives and of this policy is to assure victims can access services (i.e., medical, counseling, advocacy...) to help them address any physical or emotional needs associated with the assault without command involvement or an investigation that might cause additional distress.

Sexual assault and domestic violence (domestic abuse) are not reportable events if the victim chooses to make a restricted report to specific individuals: Sexual Assault Response Coordinator (SARC), Victim Advocate or the Family Advocacy Program Office.

PROCEDURES:

1. Inform the individual—prior to disclosure that she/he is a victim of sexual assault or domestic violence—that the military will provide assistance without notifying command or investigating the allegation. This is called restricted reporting. However, if the individual discloses details that he/she has been a victim of sexual assault or domestic violence, this constitutes a Duty To Warn situation where the consultant must notify his/her supervisor immediately.

2. For restricted reporting, the victim must speak with specific individuals and consultants can provide a warm transfer to those identified individuals. Sexual assault incidents are transferred to the Sexual Assault Response Coordinator (SARC) wherever the individual is located. Domestic violence incidents are transferred to the Domestic Abuse Victim Advocate (VA) or the Family Advocacy Program Office wherever the caller is located. The SARC, VA, or FAP Office **must** be told that the victim has requested to make a restricted report.

3. If the caller chooses to make an **unrestricted** report, notification can still be made to the

SARC or FAP office, or security police (an unrestricted report means that an investigation will occur and command will be notified).

4. The SARCs, VAs and FAP offices will thoroughly explain the restricted and unrestricted reporting process to the victim.

5. Military and Family Life Consultants should make the warm handoff to the SARC, VA or FAP office only.

Restricted reporting for sexual assault is available to active duty victims only. Third party callers, members of the reserve component not performing federal duty, retired members of any component, DoD civilians and dependents making allegations of sexual assault are not eligible for restricted reporting and should be referred to the FAPs or SARCs in their area to make an unrestricted report. Civilian victims of domestic violence who are eligible for treatment in a military medical treatment program may make restricted reports of domestic violence.

6.1.9 Security

Security is very high at military installations. Consultants are required to have picture ID and vehicle registration available when entering an installation. Vehicles are subject to search. Due to Force Protection and the status of security on base, consultants are not permitted to take pictures of security checkpoints.

Consultants should be aware that there are individuals who engage in intelligence gathering for the purpose of subversion and espionage toward the

U.S. by talking with and questioning individuals who work on or near a U.S. military installation. A consultant should not provide any information if questioned about activities with the military or the mission/activities of the installation. Consultants who witness any suspicious behaviors should contact the military POC and MHN supervisor.

6.20 Self-Promotion

Consultants are prohibited from offering or marketing any personal business services or products to military personnel, family members or civilian staff.

Consultants are prohibited from the following activities:

- Giving seminars about MFLC work
- Using MFLC program materials/concepts in any seminar
- Sharing MFLC program information and/or materials outside of the program and for any reason unrelated to MFLC program needs
- Using e-mail signature or links to promote any commercial product or service via MFLC program email communication
- Promoting any personal or political stance via MFLC program e-mail communication

Consultants may not promote themselves for any non-program purpose using the MFLC role.

6.21 Sexual Assault

Any individual reporting sexual assault/rape must be referred to the Sexual Assault Response Coordinator (SARC) immediately. The consultant can then have no further discussion or contact with the individual regarding that issue.

6.22 Traveling with Family Members

MHN does not permit family members and friends to travel with consultants to assignment locations during the service period. Family members or friends may join the consultant following completion of the assignment. The primary focus of the time should be on the work assignment. Further,

- MHN is not financially responsible for any costs associated with family members including, but not limited to, travel, lodging and meals.
- Family members, friends and pets ARE NOT ALLOWED on an installation at any time.

6.23 Untoward Events

Definition for purposes of this assignment: Any unexpected, unusual event that produces adverse results or could potentially lead to an adverse situation. For example: When leaving the consultant's office after a consultation, a client slips and falls and is injured. All untoward events should be immediately reported to the consultant's MHN supervisor. **DO NOT LEAVE A VOICE MAIL MESSAGE.** If the supervisor is not available, the consultant should call (800) 646-5613 and ask to speak with a MHN representative. If after hours, the caller will be prompted by voice mail to call the cell phone of the MHN staff on call.

6.24 Use of Government Facilities

Consultants do not have access to the commissary or PX on the installations.

6.25 Working with Children

Some assignments involve providing educational/supportive services to children in groups

or with families. If this is the case, MHN will coordinate with the military POC to ensure that the child's parents have signed the appropriate release forms giving permission for their child to participate in the program. Consultants should not supervise an individual child or a group of children *under any circumstances*; there should always be other military or civilian staff on site. The military has strict guidelines regarding child to staff ratio, and consultants should never be counted in that ratio.

6.26 Written Materials

The military POC or MHN supervisor will provide all written materials such as presentations, power points, handouts, etc. The MHN supervisor must review any presentation materials provided to the consultant by the military POC. Consultants will not be able to use any of their own written materials or develop any new materials without approval from the MHN Director of Quality and the military POC. Consultants who are asked by a military POC to provide materials should contact the MHN supervisor.

SECTION 7—ADMINISTRATIVE /BILLING AND REIMBURSEMENT

7.1 Invoicing Process

Consultants must submit invoices timely in the prescribed format as defined in this Section. The consultant must complete each invoice in its entirety, acquire a Community Officer's signature approval and submit the invoice and copies of any required receipts via fax to MHN using the fax number on the invoice. Consultant will retain the faxed invoice, any

required receipts and the fax document showing the date of successful fax transmission.

7.2 Prescribed Invoice Format

Invoice forms for MFLC services are available through our Provider Portal at **www.mhngs.com**.

Consultants should prepare invoices using the prescribed invoice form as specified below. *Consultants may not modify the layout of any invoice form*.

Table 1 *Prescribed Consultant Invoice Formats*

ROTATIONAL/FULLTIME	
TYPE OF ASSIGNMENT	**INVOICE FORM**
Rotational Staffing (Hourly and Daily)	*MFLC Consultant Rotational/Fulltime Assignment Invoice for Hourly Assignments* (MHNGS Form ACC012)
30-Day Rotational Staffing	*MFLC Consultant Rotational Assignment Invoice for 30, 45, 60 and 90 Day Rotational Assignments* (MHNGS Form ACC011)
45-Day Rotational Staffing	
60-Day Rotational Staffing	
90-Day Rotational Staffing	
Area Coordinator	

Fulltime Counseling Services, Non-Medical Counselors	*MFLC Consultant Rotational/Fulltime Assignment Invoice for Hourly Assignments* (MHNGS Form ACC012)
Fulltime Counseling Services, Personal Financial Counselors	
ON-DEMAND	
TYPE OF ASSIGNMENT	**INVOICE FORM**
2-Day Weekend Drill Support Staffing	*MFLC Consultant On Demand (2-Day Drill Weekend) Invoice* (MHNGS Form ACC013)
On-Demand Support Staffing	*MFLC Consultant On Demand (Hourly) Invoice* (MHNGS Form ACCO14)

A separate instruction is available for each type of Consultant Invoice. Consultants should read the appropriate instructions and consistently apply this guidance when completing any invoice.

7.3 Timely Submission of Invoices

ROTATIONAL/FULLTIME ASSIGNMENTS. For a Rotational/Fulltime assignment (see Table 1—*Prescribed Consultant Invoice Formats*), Consultants must submit invoices biweekly (i.e., every two weeks)

during each assignment period using the biweekly periods prescribed in the *Assignment Orientation Packet*. Consultants must claim *all* services and expenses incurred during the biweekly period on the biweekly invoice. Consultants should submit only one invoice for a biweekly period. The Consultant should fax the completed biweekly invoice and copies of any required receipts to MHN no later than the second business day after the end of the biweekly period.

ON-DEMAND ASSIGNMENTS. For On-Demand assignments, (see Table 1—*Prescribed Consultant Invoice Formats*), Consultant must claim all services and expenses incurred during the on-demand assignment on the on-demand invoice. Consultants should submit only one invoice for an on-demand assignment. Consultants must fax or scan the completed on-demand invoice and copies of any required receipts to MHN no later than the second business day after the end of the on-demand assignment.

Under no circumstances does MHN have an obligation to pay for any Consultant's services or expenses if Consultant fails to timely submit an invoice for such amounts. Any invoice submitted to MHN more than 30 (thirty) calendar days after the end of an assignment will be deemed not timely and none of the claimed amounts will be paid.

7.4 Payment for Professional Provider Services
MHN payment for professional provider services will be paid at the rate specified in the Consultant Task Order (CTO) consistent with the scope of services requested in the CTO and the specified period of the assignment in the CTO. Consultant will not claim travel time except as explicitly authorized in the CTO and when claiming travel time, will do so in the form specified in the invoice instructions. Questions regarding rates, scope of services and assignment period should be directed to Professional Relations at **mflc.program@healthnet.com**.

7.5 Payment for Airfare
If authorized in the CTO, MHN is responsible for arranging and paying for all air travel. Airfare paid by a Consultant is not reimbursed. Consultant will pay for any upgrades, excess baggage fees or changes in itinerary not required by MHN.

7.6 Payment for Rental Car
For approved rental cars, authorized in the CTO, MHN is responsible for arranging and paying for all rental cars. Rental car expenses paid by a consultant are not reimbursable. Consultant must pay for vehicle upgrades, rental car insurance, fuel obtained from rental car company, and lost keys. Consultant will pay for all rental car expenses incurred for personal use.

7.7 Payment for Lodging
If authorized in the CTO, MHN is responsible for arranging and paying for all lodging.
If lodging is not authorized in the CTO, but the assignment is in support of USAREC, MHN may still authorize lodging if (i) the consultant is required to

travel to a location other than the Assignment location noted in the CTO, and (ii) when such travel requires an overnight stay.
Lodging expenses paid by a consultant are not reimbursed. Consultants will pay for any room upgrades, fees for additional guests and non-lodging expenses including (but not limited to) in-room movies, room service, mini bar, and/or damages to room(s) and contents.

If an urgent situation requires an overnight stay that was not pre-arranged, and this overnight stay has been preauthorized by MHN Clinical Supervisor or Manager, the consultant must contact the travel department for travel arrangements by calling (866) 468-7289. If arrangements are needed after normal business hours (Pacific Time), the consultant should press '3' and follow the prompts.

7.8 Payment for Meals and Incidental Expenses
Consultant will not claim reimbursement for the actual cost of meals and incidental expenses. If authorized in the CTO, MHN will pay the Consultant the prevailing Per Diem when Consultant assignment requires the use of MHN-provided lodging. Per Diem is a daily allowance paid in lieu of reimbursement for meals and incidental expenses that might be incurred by a Consultant while traveling to/from an assignment as well as during the assignment term.

The Per Diem (daily allowance) rate is determined by reference to the prescribed government per diem rate for the place the consultant travels to/works.

The Per Diem rate is limited to 75% of the applicable daily rate for the day of travel to an assignment and return travel from the assignment.

Consultants will not be reimbursed for foreign transaction fees incurred on personal credit cards. We recommend the use of local currency in order to avoid such transaction fees.

7.9 Gifts

In no event will Consultant provide gifts (including meals) to government personnel or those representing the government regardless of amount whether claimed for reimbursement or not. Violations constitute grounds for termination whether gifts were claimed for reimbursement or not.

7.10 Business Expenses

Consultant will not claim and MHN will not reimburse Consultant for any of the following expenses.

- Airline club membership dues
- Airphone charges
- Alcoholic beverages (when not part of client entertainment)
- Annual fees for personal charge cards
- ATM fees
- Baby-sitting fees
- Baggage fees
- Barber and hairdresser services
- Car washes
- Celebration expenses (cakes, cards, gifts, etc., for birthdays, births, anniversaries, etc.)
- Clothing
- Charge card late fees, finance charges, or foreign transaction fees
- Cost of faxing invoices to MHN

- Commuting costs from a personal residence less than 50 miles from the service location
- Country Club dues
- Expenses for companions/family members
- Expenses related to vacation or personal days while on a business trip
- Expenses related to booking or rebooking for consultant personal travel (extended assignment dates)
- Fees and tips given to porters, baggage carriers, bellhops, hotel maids, stewards or stewardesses and others on ships, and hotel servants in foreign countries
- Fingerprinting or criminal history background checks that may be required for certain assignments
- Flowers
- Gasoline charges assessed by rental car agency for not refueling vehicle
- Gasoline for a personally owned vehicle
- Gas, mileage or any other transportation costs associated with travel between MHN lodging and work site each day for rotational assignments
- Golf fees
- Gum or candy
- Health Insurance, including insurance that may be required for certain assignments
- Helicopter services for airport transfer
- Hotel refrigerator rental fees
- Hotel internet access fees
- Hotel safe rental fees
- Hotel telephone fees
- Hotel room upgrades
- Immunizations or inoculations that may be required or recommended for foreign travel,

unless otherwise pre-approved in writing by a MHNGS representative

- Laundry/valet services
- Loss/theft of travel advance money or Company-paid airline tickets
- Loss/theft of personal funds or property
- Lost baggage
- Luggage and briefcases
- Magazines, books, newspapers
- Medical bills
- Movies (including in-flight and hotel movies)
- Non-compulsory insurance coverage (annual fee)
- 'No show' charges for hotel or car service
- Optional travel or baggage insurance
- Parking or traffic tickets
- Personal accident insurance
- Personal entertainment, including sports events
- Personal property insurance
- Personal telephone calls
- Pet care/or pet relocation
- Prescriptions or over-the-counter medications
- Postage costs, outside of business purposes
- Repairs due to accidents on personal vehicles
- Routine maintenance/tune-ups of personal vehicles
- Sauna or massages
- Snacks
- Shoeshine
- Souvenirs/personal gifts
- Spouse/companion travel
- Tobacco products
- Toiletries such as toothpaste, razor, etc.
- Towing charges
- Travel costs to and from the airport

- Traveler Check Fees

Baggage fees
Travel costs to and from home to airport
Immunizations or inoculations that may be required or recommended for foreign travel, unless otherwise pre-approved in writing by a MHNGS representative
Health insurance, including insurance that may be required for certain assignments
Fingerprinting or criminal history background checks that may be required for certain assignments
Cost of faxing invoices to MHN
All purchases of office supplies to include business cards and flyers must be approved in advance by the MHN Clinical Supervisor/Manager. Consultant will not claim for reimbursement and MHN will not pay for any business expenses incurred for the purchase of office supplies, business cards and flyers when pre-approval was not obtained. Consultants must include pre-approval with the invoice when claiming these expenses.

All claims for reimbursement of business expenses must be accompanied by a receipt. Consultant will not claim and MHN will not reimburse any business expense that is not accompanied by a legible receipt.

7.11 Personal Vehicle Usage

For assignments within 50 miles driving distance from the consultant's home, Consultant is required to have his or her own transportation available for driving to and from the assignment. MHN's 50- mile policy applies to distance, regardless of commute time.

Use of POV for travel in lieu of air transportation requires pre-approval by MHN Professional Relations Representative. Approval will only be

granted if use of POV is less costly to MHN than air transportation or rental car.

If travel exceeds 50 miles one-way to the assignment location, MHN at its sole discretion will determine whether it is more cost effective to reimburse for mileage or to authorize air or a car rental. If reimbursement is the least costly, Consultant is required to have his or her own transportation available for driving to and from the assignment from home or approved lodging.
For travel to and from the airport for On-Demand Assignments, MHN will reimburse consultants' travel time each way, not to exceed three (3) hours, and for expenses associated with traveling to a from the airport, e.g., mileage, van pickup, bridge tolls, etc.

7.12 Specific Terms and Conditions for On-Demand Services

7.12.1 Calculation of Payment

- Two-Day Drill Weekend consultants contracted for a two-day drill weekend shall be reimbursed for eight (8) hours for the first day regardless hours worked; and actual hours worked, up to eight hours, for the second day.
- One-Day Event - consultant shall be paid for actual hours worked up to eleven (11) hours.
- If the consultant works partial hours, the time on the invoice should be rounded up to the next half hour increment. For example: hours worked 2:00 pm to 4:15 pm would be rounded up to 2 hours and 30 minutes.

7.12.2 Late Cancellations

If the consultant's On-Demand services are cancelled with less than 24 hours notice, the

consultant may bill MHN for half the scheduled on-site time. The consultant will not receive reimbursement for the proposed travel unless travel occurred prior to cancellation. Reimbursement will be in accordance with the provisions of the CTO and the MFLC Provider Manual.

7.13 Contacts for Billing and Reimbursement Questions

Consultants may request instruction on how to bill or information on rate of payment, scope of services and assignment period from Professional Relations by E-Mailing **mflc.program@healthnet.com**.

Consultants may submit questions regarding the status or accuracy of payment on invoices and expenses reports previously submitted by E-Mailing: **MHNGS.Administrative.Support@MHN.com**

7.14 Provider Dispute Process

Consultants may utilize the Provider Dispute Process described on www.mhn.com under 'Working with MHN' as a mechanism to dispute billing and payment decisions made by MHN. The Provider Dispute Process should not be used to seek resolution on other matters including network status, credentialing decisions or contracting issues including rates.

7.15 Right of Set-off

In relation to any collection and payment of monies owed by the Consultant to MHN, MHN shall have the right, after the 45th calendar day following MHN's submission of the reimbursement request to the Consultant or after the Consultant's appeal rights have been exhausted, to set-off any payments owed

to the Consultant against any funds owing by Consultant to MHN, provided that MHN submits to the Consultant an explanation in writing in sufficient detail so that Provider can reconcile each invoice.

SECTION 8—TRAVEL

8.0 Summary of Policies regarding Mileage, Rental Car, and Lodging

The policies summarized below apply to all consultants operating under a Provider Services Task Order Agreement (PSTOA) and corresponding Rotational and On-Demand Consultant Task Order (CTO). Summaries refer to the approval language in the CTO (and accepted by MHN consultants). *Please refer to subheadings in this section for additional policy information. Note that consultants are contractually bound by all policies articulated in this manual.*

8.0.1 Policy regarding rental car vs. mileage reimbursement for privately owned vehicle (POV)

a) MHN will approve a rental car for consultants who are approved for air travel to the service location.
b) If a consultant resides more than 50 miles from the service location, MHN will conduct a comparative cost analysis to determine whether car rental or POV mileage reimbursement is more cost effective. The lowest cost option for MHN shall be approved.
c) Consultants must have or must arrange their own transportation when service location is less than 50 miles from their residence.

d) If a consultant resides more than 50 miles (each way) from the service location and MHN determines that mileage reimbursement is less costly to MHN than a rental car, consultants are responsible for having or arranging their own transportation. MHN will not approve a rental car for reasons including but not limited to the consultant's lack of a POV, refusal to use a POV or concern about the drivability of a POV.

e) For On Demand events *only*, if the consultant resides more than 50 miles (each way) from the service location, MHN will waive the rental car requirement (if less costly than mileage reimbursement) and will authorize mileage if the consultant is contacted for the event less than 2 days prior to the start date and is unable to both pick-up the rental car and reach the event on time.

8.0.2 Policy regarding mileage reimbursement for consultants driving a privately owned vehicle (POV)

a) MHN will reimburse the consultant for mileage for trips during the day that are directly in support of MFLC services being rendered (`business travel').

b) MHN will reimburse consultants for mileage if commute from their residence to service location (each way) is greater than 50 miles and if mileage reimbursement is less costly to MHN than a rental car.

c) MHN will not reimburse for mileage if a consultant's commute from residence to

service location each way is less than or equal to 50 miles.

d) Mileage between lodging and service location is not reimbursable.
e) Mileage for personal travel is not reimbursable, Personal travel includes (but is not limited to): trips on weekends, weekend trips home and back if lodging is approved, or other personal travel not specifically related to the assignment.
f) Reimbursement shall be limited to the Internal Revenue Service mileage rate applicable on the respective days of business travel.

8.0.3 Policy regarding gas reimbursement for consultants approved for a rental car

a) MHN will reimburse consultants for gas for trips during the day that are directly in support of the services being rendered ('business travel').
b) MHN will reimburse consultants for gas used driving to and from their lodging/residence and service location each day.
c) Gas for personal travel is not reimbursable. Personal travel includes, but is not limited to trips on the weekend, weekend trips home and back if lodging is approved, or other personal travel not specifically related to the assignment.

8.0.4 Policy regarding lodging stays

a) MHN shall approve lodging for consultants who are approved for air travel to service location.

b) MHN will not approve lodging if the drive from a consultant's residence to the service location is 50 miles or less regardless of commute time.

c) Unscheduled Overnight Stays: As necessitated by special needs of the assignment, weather or travel delays and upon prior approval by Field Operations Supervisor, consultants may contact the Travel Department to obtain overnight lodging. Consultants will be paid 75% of one day's per diem to cover the cost of associated meals. This provision is applicable for assignments for which Provider is not already receiving a per diem and/or is pre-approved for scheduled lodging.

d) If a consultant elects to stay with friend/family member rather than MHN lodging, the consultant will not receive any additional payment in place of lodging.

8.0.5 Policy regarding Per Diem payments:

a) Consultants will receive a per diem if lodging is approved.

b) Consultants who are eligible for lodging will receive a per diem if staying with friend/family member in lieu of MHN lodging.

c) Consultants will not receive a per diem if neither circumstance above applies (other than the per diem payment specified in Paragraph D above Unscheduled Overnight Stays).

d) Per Diem payments, if authorized, are paid in accordance with the terms in the CTO.

8.1 Travel Documents (OCONUS only)
A valid U.S. passport and travel itinerary is required for all OCONUS travel. The DoD will issue an Invitational Travel Order (ITO). As part of the on-site orientation, consultants will also be issued a military base identification card. The consultant must keep this card secure and return the card at the end of each assignment; cards may not be used again. As applicable, ITO papers and the military identification card must be carried at all times.

8.2 Travel Arrangements
All travel arrangements are arranged through Cliqbook and are paid for by MHN through the Health Net travel department. ***Consultants are required to book travel within 24 hours of receipt of the Consultant Task Order (CTO).*** The consultant must contact the airline directly to request a change in seat assignment or apply or request an upgrade. *All upgrades are the financial responsibility of the consultant.*

8.3 Emergencies
During a travel period, if the consultant has an *emergency* situation, an 800 number is available for support as shown on the travel itinerary. *This service is for emergency situations only.*

In the event of a *true* emergency, MHN will allow the consultant to return home. MHN will pay for changes to the flight arrangements only if a *true* emergency exists. If MHN determines that the reason for return is not a *true* emergency, the cost of changing the flight arrangements will be the individual's responsibility.

For consultants who must return home in response to an emergency, but who then wish to continue the assignment:

- The consultant must pay his/her own airfare and associated costs
- Lodging will be discontinued while the consultant is away
- The consultant should submit a receiving report which details only actual hours worked
- Consultants should only invoice for hours worked
- The consultant should not bill for, and MHN will not pay, daily meals/incidentals/per diem during hiatus from assignment.
- Health Net Travel will determine whether it is more cost effective to continue any existing rental car contract, or whether the consultant should return the rental car to the renting facility. Airport parking fees will be the responsibility of the consultant.

8.4 Rental Cars

8.4.1 Policy regarding mileage reimbursement for consultants using an approved rental car

- MHN will reimburse consultants for gas for all work-related mileage.
- MHN will reimburse consultants for gas used in driving to and from lodging/hotel and service location each day.
- For those consultants driving an approved rental car and approved for lodging, MHN will reimburse for gas for one trip to the service

location and one trip home for each assignment.

- Personal travel is not reimbursable (i.e., trips on the weekend or weekend trips home and back).

8.4.2 Additional policies regarding use of approved rental cars

- It is not necessary to purchase any additional car insurance from the rental agency. Adequate insurance is included in the corporate arrangements for rental cars. Additional insurance, if selected, shall be the responsibility of the consultant.
- The fuel option should not be selected.
- The consultant is responsible for filling the tank prior to returning the car to the rental agency.
- Please double-check the fuel the rental car needs before refueling your car. You are responsible for the cost of the damage of the rental car if you put wrong fuel in the car.
- Cars should be inspected carefully at time of rental and all scratches and dents should be documented. Cars should be returned in good condition. If not, excessive wear and tear may be the responsibility of the consultant.
- Please note that many countries issue speeding tickets from video cameras, which are then sent to Health Net. If a parking or speeding ticket is received, you are responsible for these charges.
- Hertz GPS is not guaranteed unless otherwise stated by a TEAM Supervisor/Manager in writing (i.e., via E-Mail) that you specifically need this feature for business purposes.

Consultants are responsible for any and all costs associated with unapproved GPS.

8.4.3 Policy regarding mileage reimbursement for consultants driving a privately owned vehicle

- Consultants will receive reimbursement for mileage for business related travel as approved by MHN.
- MHN payment for authorized use of a privately owned vehicle (POV) is limited to business mileage at the prevailing Internal Revenue Service (IRS) mileage rate.
- A consultant may not claim mileage for commuting if distance traveled is less than 50 miles. Commuting is defined as driving between home and assignment location (one-way).
- Consultants may claim mileage reimbursement for driving POV from home to airport regardless of distance when total expenses (inclusive of airport parking) are reasonable when compared to use of taxi/shuttle service.
- For consultants who have been approved for lodging, MHN will reimburse for mileage from lodging to service location each day if using POV.

8.5 Travel Support

If any changes to travel, lodging or rental car are needed once travel has been initiated, the consultant must contact the MHN supervisor or AC, if applicable, via phone or E-Mail as soon as possible. The supervisor/AC will need to make the necessary arrangements and adjustments in order to make certain travel and lodging are paid correctly, and will

confirm approval in writing. Otherwise, the consultant may be responsible for additional charges. Note that all costs associated with unapproved changes will be the responsibility of the consultant.

8.6 Hotels and Lodging

A hotel stay will be approved in all cases where transportation to the assignment requires air travel. Hotel stays may also be approved if the consultant's driving distance exceeds 50 miles each way. Hotel stay during assignment will *not* be approved for consultants driving less than 50 miles each way. regardless commute time.

For approved unscheduled overnight stays, MHN will pay for lodging and 75% of one-day's per diem to cover meals associated with the overnight stay. This provision is applicable only if the consultant is not receiving a per diem payment for the assignment, and only if the overnight stay is pre-approved by MHN.

All approved lodging is arranged and paid for by MHN through the Health Net travel department. Health Net Travel will select consultant lodging based upon corporate travel policy. Hotel location will not be chosen according to consultant preference and hotel assignment may not be changed based upon consultant preference. Approved hotels may not be pet-friendly; therefore, consultants will not be permitted to bring pets along to assignment unless accommodations assigned by Health Net Travel permit pets. (Note that consultants may not choose accommodations based upon the lodging's pet policy. Any expenses associated with pets are the consultant's responsibility.)

8.7 Extending Travel for Non-Business Purposes

Travel to and from assignment will be booked by Health Net travel according to assignment dates on the Consultant Task Order (CTO). Costs associated with extending travel for non-business purposes are the responsibility of the consultant, including any penalties incurred as a result of changes to travel arrangements made by MHN.

8.8 Packing and Luggage

It is important for the consultant to consider carefully what to pack, assuring wardrobe sufficiency while keeping in mind management of luggage. Each consultant is responsible for carrying his or her own luggage under *all circumstances without accommodation.* Many OCONUS assignments involve train travel and airports without easy access to elevators. Weight limits vary by airline and country. Consultants should contact their airline(s) prior to traveling to obtain current weight restrictions for all planned travel locations. (See *specific baggage policy under section 7, number 7.5.*)

8.9 Health Insurance

Each consultant is responsible for his/her own health insurance. Costs associated with illness are the responsibility of the consultant. Consultants injured while at work on an On-Demand or CONUS Rotational Assignment are also responsible for the medical costs associated with the injury. Consultants injured while at work on an OCONUS Rotational Assignment are covered by the Defense Base Act insurance. Such incidents should be reported to the MHN supervisor immediately.

8.10 Required Inoculations

MHN shall notify consultants in advance if any inoculations are required for a specific assignment.

SECTION 9—APPENDIX

9.1 Important Contact Information

CONUS MFLC Program Main Number
(800) 646-5613
(972) 550-2584 (fax)

Travel Department
(866) 468-7289 (toll free)
After hours, select option '3'and wait for the prompt

MHN Government Services Corporate Office
2370 Kerner Blvd
San Rafael, CA 94901

Professional Relations
MHN
P.O. Box 10086
San Rafael, CA 94912
(800) 541-3353
866-581-9533 (fax) General Information E-Mail:
mflc.program@healthnet.com

9.2 Definition of Terms

ACS: Army Community Services

A&FRC: Airman and Family Readiness Center

ACSO (ACS Officer): Ranking ACS Office. Oversees Consultant duties on post.

BOG: Boots on (the) Ground: Number of Troops available

Brief (or Briefing): Giving specific instructions or information.

CONUS: Continental United States

DA: Department of the Army

De-Mobilization (DMOB): The process of transitioning a conflict or wartime military establishment or unit to a pre-deployment state.

Deployment: The relocation of forces and materiel to desired operational areas. Deployment encompasses all activities from origin or home station through destination, specifically including intra-continental United States, intertheater, and intratheater movement legs, staging, and holding areas.

DoD: Department of Defense

Down Range: physically in a combat zone or deployed from home base.

FFSC: Fleet and Family Service Center (Navy)

IMA: Installation Management Agency

IMA-E (or IMA-Eur): Installation Management Agency Europe

In Country: physically in a combat zone, see also 'Down Range'

KIA: Killed in Action

MFLC: Military and Family Life Counseling/Consultant

Mobilization (MOB): The process by which the Armed Forces or part of them are brought to a state of readiness for war or other national emergency. This includes activating all or part of the Reserve or Guard Components as well as assembling and organizing personnel, supplies, and material; the time when troops are mobilized for deployment.

MOS: Military One Source; Military Occupational Specialty (Job Classification)

OCONUS: Outside (the) Continental United States, including Alaska, Hawaii and Puerto Rico

OEF: Operation Enduring Freedom

OFP: Office of Family Policy

OIF: Operation Iraqi Freedom

OSD: Office of the Secretary of Defense

POC: Point of Contact

R&R: Return & Reunion Brief

Re-Deployment: The transfer of forces and materiel to support another joint force commander's operational requirements, or to return personnel, equipment, and materiel to the home and/ or demobilization stations for reintegration and/or out-processing.

SITREP: Situation Report

SOP: Standard Operating Procedure

State Side: The United States. Troops stationed in the United States

Theater: The geographical area outside the continental United States for which a commander of a combatant command has been assigned responsibility. The area of air, land, and water that is, or may become, directly involved in the conduct of the war.

TRICARE: Medical and Behavioral health insurance for troops and their families

WIA: Wounded in Action

9.3 Helpful Web Sites

http://www.au.af.mil/au/awc/awcgate/awc-port.htm

Air War College Military Quick-Portal - multiple links for all BOS

http://www.defenselink.mil/

Part of DOD

http://www.dtic.mil/doctrine/jel/doddict/

DoD list of military terms

http://www.military.com/

Online news-magazine

http://www.nmfa.org/site/PageServer

National Military Family Association

http://www.militarychild.org/

Military Child Education Coalition

http://www.militarycity.com/

Media times for all BOS

http://merin.ndu.edu/

Military Policy Awareness Links - MIPALs - which provide direct access to defense-related U.S. policy statements on selected key topics.

http://www.militarywoman.org/

Women in the military

http://www.stripes.com/

Military newspapers sent to military personnel overseas

http://members.aol.com/forvets/insig/undec.htm

Describes all BOS medals, citations, decorations

http://www.2aces.com/endter/milfam.html

provides various links for families

OCONUS:

www.gettingaround.net (A guide to U.S. military installations in Europe.
Go to Web Site and click on icon for **USAREUR**)

www.per.hqusareur.army.mil/reintegration/
(Provides information regarding Reunion and Reintegration issues for military members and their families)

9.4 Forms

Various forms may be required according to the CTO, including, but not limited to:

- Activity Form (available online)

- Expense Report
- After Event Summary
- Invoice

[MHN Military Family Life Consultants]

MILITARY AND FAMILY LIFE CONSULTANT PROGRAM SUMMARY

The DoD (Department of Defense) is committed to supporting military families, recognizing that service to our nation places a heavy demand on these families. As a behavioral health subcontractor for the DoD, MHN Government Services is currently offering practitioners a unique opportunity to support Service members and their families.

The MFLC program was piloted under the name Military Family Life Consultant in 2004 to meet the specific need of providing supplemental services to families of extended 1st Armored Division Soldiers. The success of the program in United States Army/Europe has resulted in expansion of MFLC services for all Military Services within the continental United States, Alaska, Hawaii, Europe and the Pacific Rim.

The MFLC program is contracted through the Office of the Secretary of Defense. MFLCs work at military installations both stateside and overseas, assisting Service members and their families with a variety of issues, through the cycles of deployment and reintegration back to their families and communities.

The program was designed to deliver short term, situational, problem-solving non-medical counseling services. MFLC support addresses issues that occur specifically within the military lifestyle and helps Service members and their families cope with normal reactions to the stressful/adverse situations created

by deployments and reintegration. The services of MFLCs are intended to augment existing military counseling services.

Role of Consultants

The consultants' role in this program is unique in that they are not working as traditional therapists. The primary MFLC role is to assess needs, provide support or refer to appropriate resources as necessary. Assisting a Military Service member and/or family in developing an action plan to address a problem is a key component of the program. All consultants work under the direction of an MHN clinical supervisor and a military point of contact (POC).

Although locations, programs and commitment length vary, practitioners on rotational assignments are typically asked to make a 30-90 day time commitment to the assignment. (We have an increasing need for practitioners willing to accept 60-day assignments.) On Demand assignments also include non-medical counseling support and psychoeducational presentations and primarily support National Guard/Reserve Component Service members and their families. On Demand services are typically required on weekends, at National Guard Drill Centers or Reserve Centers. Acceptance of any assignment is voluntary; there is no obligation to commit.

To be considered for the DoD Network, consultants must meet the following minimum qualifications:

- **Have a valid state license as an independent behavioral health care practitioner. *Providers eligible for network participation are:*** Psychologists, Social Workers, Professional Counselors, Marriage Family Therapists, Registered Nurses (with psychiatric specialty).
- Professional liability insurance of at least $1 million/$1 million
- Possession of an active U.S. Passport; (or be willing to acquire one before assignments outside the United States)
- Must have or be able to acquire Social Security card
- Valid driver's license and willingness to drive at assigned locations
- Ability to drive a standard transmission vehicle if interested in working overseas
- May not be currently employed by a behavioral health care plan
- Must have a valid email address and frequent computer access
- Must physically be able to carry one's own luggage through travel process, and be willing and able to walk and be physically active while on bases

Preferred Direct Practice Experience. You must have three of the following:

- Training and experience in rapid assessment and problem resolution (e.g. EAP)
- Ability to work in various environments helping people identify problems and develop action plans

- Experience working with children and adolescents
- Experience working with couples and families
- Experience working with grief and loss
- Experience with Veterans or Veteran Affairs
- Experience working with military personnel and families
- Experience working in school systems

Participation in the program is contingent upon:

- Recommendation of the Clinical Director following a personal interview
- Meet MHN's credentialing requirements
- Passing a criminal history and background check
- Compliance with MFLC training program

If you meet all of the minimum qualifications, possess three or more Preferred Direct Practice Experience requirements and would be interested in participating in this program, please complete the MFLC questionnaire and send it, **along with a current copy of your resume, via e-mail, to mflc.program@healthnet.com**

TIMOTHY J. LONG
(STATE BAR NO. 137591)
tjlong@orrick.com
LAURI A. DAMRELL
(STATE BAR NO. 241010)
ldamrell@orrick.com
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Facsimile: +1-916-329-4900

Attorneys for Defendants
MHN GOVERNMENT SERVICES, INC. and
MANAGED HEALTH NETWORK, INC.

The Honorable
Susan Y. Illston

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THOMAS ZABOROWSKI and VANESSA BALDINI, on behalf of themselves, and all others similarly situated, Plaintiffs, v. MHN GOVERNMENT SERVICES, INC. and MANAGED HEALTH NETWORK, INC., Defendants.	Case No. 3:12-cv-05109-SI **CLASS ACTION** **DECLARATION OF DENA MADDOX IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS PENDING ARBITRATION** Date: December 7, 2012 Time: 9:00 a.m. Courtroom: 10 Judge:Honorable Susan Illston

I, Dena Maddox, hereby declare:

1. I am the Vice President, Professional Relations for MHN Government Services, Inc. ('MHNGS') and I make this declaration in support of Defendants' Motion to Compel Arbitration and Stay Proceedings Pending Arbitration. The facts set forth in this declaration I know to be true of my own personal knowledge. If called as a witness I could and would testify competently to the matters set forth in this declaration.

2. Due to my role as Vice President, Professional Relations, I am familiar with the qualifications that Military and Family Life Consultants ('MFLCs') must meet in order to join MHNGS's MFLC network. I am also familiar with documents related to independent contracts for MFLCs, including the purpose, content and use of the Provider Services Task Order Agreement ('PSTOA'), which is the standard contract used by MHNGS to contract with credentialed counselors who will provide MFLC services.

3. MHNGS contracts with the U.S. Department of Defense ('DOD') to provide military service members and their families with access to a global network of highly experienced, licensed service providers ('MFLCs') who offer confidential life-skills counseling services.

4. MHNGS has contracted with more than 5,000 MFLCs who are highly-mobile and work at military installations throughout the world,

sometimes traveling frequently on a rotational basis to provide these temporary services.

5. MHNGS engages independent, highly-trained professionals to meet the DOD's needs. To qualify for engagement, all MFLCs must be highly educated and have professional licenses that require advanced training and graduate degrees. These qualifications are necessary to ensure that MFLCs can fully understand their unique mission and what is within the specific scope of services they have contracted to provide to the military.

6. MFLCs participate in short-term, rotational engagements at military sites. The short-term rotational nature of the MFLCs' engagements is designed to ensure that the counseling provided has both the appearance and reality of being confidential, independent, and detached from the military leadership at each installation so that service members and their families feel comfortable using the services provided.

7. Plaintiff Thomas Zaborowski contracted with MHNGS to provide MFLC services. Plaintiff Zaborowski signed a PSTOA on July 1, 2010. Attached herein as Exhibit A is a true and correct copy of the PSTOA Plaintiff Zaborowski signed.

8. Plaintiff Vanessa Baldini contracted with MHNGS to provide MFLC services. Plaintiff Baldini signed a PSTOA on December 4, 2008. Attached herein as Exhibit B is a true and correct copy of a PSTOA Plaintiff Baldini signed.

9. MFLCs also own and operate private consulting businesses.

10. For example, at the time Plaintiff Baldini entered the MHNGS network, she represented that she maintained a private practice and was accepting new patients. Attached herein as Exhibit D is a true and correct copy of the credentialing questionnaire that Vanessa Baldini completed to enter into MHNGS's network, with personal identification information redacted.

11. Similarly, Plaintiff Zaborowski represented that he was providing independent consulting services to mental health providers on behavioral health issues. Attached herein as Exhibit C is a true and correct copy of the credentialing questionnaire that Thomas Zaborowski completed to enter into MHNGS's network, with personal identification information redacted.

12. Given the level of skill and professional credentials that the MFLCs must have to join MHNGS's network, recruiting them is highly competitive. MHNGS is not alone in the market and competes fiercely with other provider networks to recruit licensed counselors. It is a 'seller's market'—as the sellers of their expertise and services, the licensed counselors whom MHNGS seeks to engage are able to pick and choose from among many provider networks and the opportunities the networks offer.

13. This is true not only in the market generally, but also within the scope of the

Department of Defense's MFLC program. MHNGS competes directly with a number of other providers to fill MFLC rotations throughout the U.S. and the world. Competition is even greater for highly-specialized engagements in more challenging locations, such as Djibouti, Africa, since fewer licensed counselors are qualified for and interested in those engagements.

14. Licensed counselors can pick and choose their engagements and ultimately have a variety of options when determining how, when, whether, or where to provide their services. They can provide services as contractors for MHNGS, for other providers, through their own private practices, or not at all. In addition, if MHNGS contacts them regarding an available engagement, the MFLC can decline for any reason, such as if they do not like the timing or the location.

Dated: November 1, 2012

By: _____
Dena Maddox

Exhibit C to Declaration of Dena Maddox

CAQH Data Summary as of 07/01/2010
Zaborowski, Thomas M Clinical Social Worker
CAQH Provider ID 12119335

Prepare

Provider Type:
Clinical Social Work
Hospital-based provider: **No**

Primary Practice State-Desc: **MN**

Personal Information

Last Name: **Zaborowski**
First Name: **Thomas**
Middle Name: **M**
Suffix:
Spouse Last Name (optional):
Spouse First Name (optional):
Gender: **Male**
Date of Birth: **[Redacted]**
Birth City: **[Redacted]**
Birth Country:**[Redacted]**
Birth State: **[Redacted]**
SSN: **[Redacted]**
U.S. Citizen: **Yes**
Address: **[Redacted]**
City: **[Redacted]**
Zip Code **[Redacted]**
State: **[Redacted]**
Country: **[Redacted]**
Province: **[Redacted]**
Address: **[Redacted]**
Home Phone Number: **[Redacted]**
City: **[Redacted]**
Zip Code: **[Redacted]**
Country: **[Redacted]**
State: **[Redacted]**
E-mail Address: **[Redacted]**
Province: **[Redacted]**
Preferred Mailing Address: **Home**
Do you speak a language other than English with sufficient fluency to treat patients who speak only that language: **No**
Pager Number

Professional Identifications Numbers

UPIN:
State: **MN**
Date Issued: **06/06/1990**
License Status: **Active**
State: **MN**
Date Issued: **01/04/1991**
License Status: **Active**

NPI:
License Number: **07906**
Expiration Date: **12/31/2010**

License Number: **2172**
Expiration Date: **01/31/2011**

Education

Country: **United States**
Address: **[Redacted]**
City: **[Redacted]**
Postal Code: **[Redacted]**
Phone Number (if known):
From: **06/01/1980**
Degree: **MA**
Date Issued:

Professional School: **Saint Mary's College**
Suite/Building #:
State: **[Redacted]**
Province:
Fax Number (if known):
To: **12/18/1983**
ECFMG Number:
Valid Through:

Training Information

Do you have any current support certifications (BLS, CPR, ACLS, ATLS, etc.)? **No**

Specialty Information

Primary Specialty: **Social Worker, Clinical**

Primary Specialty Initial Certification Date: **06/06/1990**

Last Recertification Date (if applicable): **12/31/2008**

Expiration Date (if applicable): **12/31/2010**

Name of Certifying Board: **Minnesota Board of Social Work**

If not certified, please state your intent for certification and describe the status of your efforts and eligibility, including scheduled date of exams, if any.

Secondary Specialty: **Other, Not Listed**

Secondary Specialty Initial Certification: Date: **01/04/1991**

Last Recertification Date (if Applicable): **01/31/2009**

Expiration Date (if applicable) **01/31/2011**

Name of Certifying Board: **Minnesota Board of Psychology**

If not certified, please state your intent for certification and describe the status of your efforts and eligibility, including scheduled date of exam, past failures of written or oral exams, if any.

Practice Locations

Please indicate if this is your primary office location: **Primary Practice**
Office Street Address: **[Redacted]**
City: **[Redacted]**
Zip Code: **[Redacted]**
Office Phone Number: **[Redacted]**
Federal Tax ID Number: **38-9468900**
Currently practicing at this location? **No**
Do you intend to practice as:
Primary Specialty: **Social Worker, Clinical**

Physician Group/Practice name to appear in directory: **Thomas Zaborowski**
Suite, Department, etc.
State: **[Redacted]**
ZIP+4: **[Redacted]**
Fax Number: **[Redacted]**
E-mail Address: **[Redacted]**
Expected Start Date:

Provide a narrative description of your clinical practice including special interests: **My specialties are working with individuals and families in rapid assessment and problem resolution, developing action plans, grief/loss and as an advisor to schools.**

Is over 50 percent of your practice primary Care? **No**	
Will you continue to practice at this Location? **No**	If no, last date of employment: **06/30/2010**
Credentialing Contact Last Name: **Zaborowski**	First Name: **Thomas**
Middle Initial: **M**	Phone Number: **[Redacted]**
Fax Number:	E-Mail Address: **[Redacted]**
Street Address: **[Redacted]**	Suite, Department, etc.
City: **[Redacted]**	State: **[Redacted]**
ZIP Code: **[Redacted]**	
Billing Contact:	
Billing Name: **Thomas Zaborowski**	Last Name: **Zaborowski**
First Name: **Thomas**	Middle Initial: **M**
Street Address: **[Redacted]**	Suite, Department, etc.
City: **[Redacted]**	State: **[Redacted]**
ZIP Code: **[Redacted]**	Office Phone Number: **[Redacted]**
Fax Number:	

Hospital Information

If no hospital privileges, describe method/coverage for continuity of care:	**Currently I do consulting work and do not provide direct services to patients.**

Insurance Information

Insurance Carrier Name:
Not Insured
State:
To:
Suite/Building #:
Province:
Expiration Date:
04/23/2007

Insurance Carrier Name:
Not Insured
State:
To:
Suite/Building #:
Province:
Expiration Date:
04/23/2007

Work History Information

Organization Name/Activity:
Behavioral Health Consultant
Suite/Building #:
[Redacted]
State: **[Redacted]**
Province: **[Redacted]**
Phone Number:
[Redacted]
From: **05/01/2007**
Reason for Leaving:
Currently consulting to mental health providers on behavioral health issues.
Contact First Name:
[Redacted]

Address: **[Redacted]**
City: **[Redacted]**
Postal Code:
[Redacted]
Country: **[Redacted]**
Fax Number (if known): **[Redacted]**

To:

Contact Last Name:
[Redacted]
Clinic Still Open? **Yes**

Organization Name/Activity: **Valeo Behavioral Health Care**
Suite/Building #: **[Redacted]**
State: **[Redacted]**
Province: **[Redacted]**
Phone Number: **[Redacted]**
From: **01/15/2001**
Reason for Leaving: **Provide consulting to behavioral health care organizations.**
Contact First Name: **[Redacted]**

Address: **[Redacted]**
City: **[Redacted]**
Postal Code: **[Redacted]**
Country: **[Redacted]**
Fax Number (if known): **[Redacted]**

To: **04/23/2007**

Contact Last Name: **[Redacted]**
Clinic Still Open? **Yes**

Organization Name/Activity: **Family and Children's Services**
Suite/Building #: **[Redacted]**
State: **[Redacted]**
Province: **[Redacted]**
Phone Number: **[Redacted]**
From: **08/01/1996**
Reason for Leaving: **Clinic closed**
Contact First Name: **[Redacted]**

Address: **[Redacted]**
City: **[Redacted]**
Postal Code: **[Redacted]**
Country: **[Redacted]**
Fax Number (if known): **[Redacted]**

To: **07/31/2000**

Contact Last Name: **[Redacted]**
Clinic Still Open? **No**

Organization Name/Activity: **Southern Nevada Mental Health Services**
Suite/Building #: **[Redacted]**
State: **[Redacted]**
Province: **[Redacted]**
Phone Number: **[Redacted]**
From: **08/15/1995**
Reason for Leaving: **Offered employment with Family and Children's Services which was closer to parents/relatives (Wisconsin)**
Contact First Name: **[Redacted]**

Address: **[Redacted]**
City: **[Redacted]**
Postal Code: **[Redacted]**
Country: **[Redacted]**
Fax Number (if known): **[Redacted]**
To: **08/14/1996**
Contact Last Name: **[Redacted]**
Clinic Still Open? **Yes**

Organization Name/Activity: **Relate Counseling Center**
Suite/Building #: **[Redacted]**
State: **[Redacted]**
Province: **[Redacted]**
Phone Number: **[Redacted]**
From: **03/01/1981**
Reason for Leaving: **Opportunity for professional growth and higher salary**
Contact First Name: **[Redacted]**

Address: **[Redacted]**
City: **[Redacted]**
Postal Code: **[Redacted]**
Country: **[Redacted]**
Fax Number (if known): **[Redacted]**

To: **07/31/1995**

Contact Last Name: **[Redacted]**
Clinic Still Open? **Yes**

From: **08/01/2000**
Explain: **Interviewed for position and was offered employment with Valeo Behavioral Care Topeka, Kansas. Several trips were made to meet stakeholders and assess community needs during the last three months of 2000.**

To: **01/01/2001**

References
Information

First Name: **[Redacted]**
Title: **Board President**
Address: **[Redacted]**
City: **[Redacted]**
Postal Code: **[Redacted]**
Country: **[Redacted]**
Fax Number: **[Redacted]**

Last Name:
[Redacted]
Facility Name: **Valeo Behavioral Health Care**
Suite/Building #:
[Redacted]
State: **[Redacted]**
Province: **[Redacted]**
Phone Number:
[Redacted]
E-Mail Address:
Suite/Building #:
[Redacted]

First Name: **[Redacted]**
Title: **Clinical Social Worker**
Address: **[Redacted]**
City: **[Redacted]**
Postal Code: **[Redacted]**
Country: **[Redacted]**
Fax Number: **[Redacted]**

Last Name:
[Redacted]
Facility Name:
Shunga Creek Menatl[sic]Health Center
Suite/Building #:
[Redacted]
State: **[Redacted]**
Province: **[Redacted]**
Phone Number:
[Redacted]
E-Mail Address:
Suite/Building #:
[Redacted]

First Name: **[Redacted]**
Title: **Medical Director**
Address: **[Redacted]**
City: **[Redacted]**
Postal Code: **[Redacted]**
Country: **[Redacted]**
Fax Number: **[Redacted]**

Last Name:
[Redacted]
Facility Name:
Wyandot Center
Suite/Building #:
[Redacted]
State: **[Redacted]**
Province: **[Redacted]**
Phone Number:
[Redacted]
E-Mail Address:
Suite/Building #:
[Redacted]

Disclosure information

1. Has your professional license or registration ever been terminated, stipulated, restricted, limited, conditioned, suspended, revoked, refused, voluntarily relinquished or not renewed by any licensing board or any health-related agency organization, or is there a review pending? **No**

2. Has your professional license or registration ever been investigated or is it currently being investigated and, if so, what were the results? **No**

3. Has your DEA registration ever been revoked, suspended, limited, or conditioned in any way, or have you voluntarily relinquished your DEA registration, or is there a review pending? **No**

4. Has you membership, participation, clinical privileges, or employment ever been denied, terminated, stipulated, restricted, refused, limited, suspended, revoked, or not renewed by any peer review organization, third party payer, clinic, hospital, medical staff, or any health-related agency or organization, or is there a review pending? **No**

5. Have you ever voluntarily relinquished your membership, participation, clinical privileges or request for privileges, employment, professional license, or registration in lieu of disciplinary action, or prior to or during an investigation into your professional conduct or competency? **No**

6. Have you ever involuntarily relinquished your membership, participation, clinical privileges or

request for privileges, employment, professional license or registration? **No**

7. Has your membership or fellowship in any professional organization or your specialty board certification ever been voluntarily or involuntarily denied, terminated, restricted, limited, suspended or revoked? **No**

8. Have you ever been reprimanded, censored, or otherwise disciplined by, or have you ever been subject to a corrective action agreement/plan with any licensing board, peer review organization, third party payer, clinic, hospital, medical staff, or any health-related agency or organization? **No**

9. Has your certificate or participation in any private, federal (i.e. Medicare, Medicaid, etc.) or state health insurance program ever been revoked or otherwise limited or restricted, or is any investigation or proceeding with respect to any such action presently underway? **No**

10. Are there any charges pending or are you currently charged with or have you ever been indicted or found guilty of a felony, gross misdemeanor, misdemeanor (other than a minor traffic violation) or other offense? **No**

11. Have you ever been found liable, guilty, or responsible for sexual impropriety or misconduct or sexual harassment with a patient, co-worker, or other? **No**

12. Have you ever had any professional liability claims or lawsuits brought against you, including pending claims or lawsuits, dismissed or dropped claims or lawsuits, settlements or final judgements? **No**

13. Has your professional liability carrier ever refused or canceled your coverage or excluded you from performing any specific privileges within your specialty? **No**

14. Have you ever practiced within your profession without professional liability insurance? **No**

15. Do you have a physical or mental condition that would affect your ability, with or without reasonable accommodation, to provide appropriate care to patients and otherwise perform the essential functions of a practitioner in your area of practice without posing a health or safety risk to your patients? **No**

16. Does your use (or have you been told that your use) of alcohol or drugs affect your ability, with or without reasonable accommodation, to provide appropriate care to patients and otherwise perform the essential functions in your area of practice without posing a health risk to your patients? **No**

17. Are you currently using illegal drugs? ('Currently' means sufficiently recent to justify a reasonable belief that the use of drugs may have an ongoing impact on one's ability to practice medicine. 'Illegal use of drugs' refers to drugs whose possession or distribution is unlawful under the Controlled

Substances Act, 21 U.S.C. sec. 812.22., it 'does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provision of Federal law.' The term does include, however, the unlawful use of prescription controlled substances.) **No**

Additional Explanation

I have been working as a mental health Consultant since I left Valeo BHC in April of 2007. I provided these services from my home in Las Vegas. From 1995 to 2001 I was in Supervisory roles in mental health facilities providing leadership, education, training and administrative duties. I did not carry Professional Liability Insurance since I did not provide direct clinical services to clients. While at Relate Counseling Center in Minnesota I did provide direct clinical services to clients after becoming licensed as a LICSW (Licensed Independent Clinical Social Worker) in June 1990 (MN07906) and as a Licensed Psychologist in January 1991 (LP2172) and carried Professional Liability Insurance ($1M). I have maintained both of these licenses. I am applying for a Military & Family Life Consultant position with MHN. If hired, I will obtain $1M Professional Liability Insurance.

My specialties are working with individuals and families in rapid assessment and problem resolution, developing action plans, grief/loss and as an advisor to schools.

Thank you,

Thomas Zaborowski

Exhibit D to the Declaration of Dena Maddox

CAQH Data Summary as of 10/24/2011
Baldini, Vanessa D Marriage/Family Therapist
CAQH Provider ID 12200408

Prepare

Provider Type: **Marriage/Family Therapist**
Hospital-based provider: **No**
Primary Practice State-Desc: **CA**

Personal Information

Last Name: **Baldini**
First Name: **Vanessa**
Middle Name: **D**
Suffix:
Have you used other names? **No**
Birth Date: **[Redacted]**
Birth City **[Redacted]**
Birth State:**[Redacted]**
Birth Country: **[Redacted]**
Gender: **Female**
FNIN:
SSN: **[Redacted]**
Non-English languages: **Spanish**
Address: **[Redacted]**
City: **[Redacted]**
State: **[Redacted]**
Zip Code: **[Redacted]**
Phone Number: **[Redacted]**

Professional Identification Numbers

State License Number: **MFT35441**
License Status: **Active**
Current Practice State: **Yes**
Expiration Date: **01/12/2012**
Do you have a State Controlled Substances Registration Certificate?: **No**
Medicare: **No**
Medicaid: **No**
Do you have a UPIN: **No**
ECFMG Number: **No**
NPI: **1376677302**

License Type: **MFT**
License State: **CA**
Issue Date: **01/12/1999**
DEA Number?: **No**

UPIN
ECFMG Issue Date:

Education

Graduate Type:
US/Canadian Graduate
Professional School:
California State University, Northridge
Suite/Building #:
State: **[Redacted]**
Province: **[Redacted]**
Phone:
Affiliated University:
Professional School Start Date: **08/1994**
Education completed at this school: **Yes**

Address: **[Redacted]**
City: **[Redacted]**
Postal Code: **[Redacted]**
Fax: **[Redacted]**
Degree: **MS**
Professional School End Date: **06/1996**
Do you have other relevant education for which a degree was obtained? **Yes**

Institution/School Name:
Santa Monica College
Suite/Building #
State: **[Redacted]**
Country: **[Redacted]**
Phone: **[Redacted]**
Degree: **AA**
End Date: **05/1992**

Address: **[Redacted]**
City: **[Redacted]**
Province: **[Redacted]**
Postal Code: **[Redacted]**
Fax:
Start Date: **02/1991**
Did you complete the degree at this institution? **Yes**

School Name: **California State University Northridge**	Address: **[Redacted]**
Suite/Building #:	City: **[Redacted]**
State: **[Redacted]**	Province: **[Redacted]**
Country: **[Redacted]**	Postal Code: **[Redacted]**
Phone:	Fax:
Start Date: **06/1992**	End Date: **06/1994**
Degree: **BA**	Did you complete your undergraduate education at this school? **Yes**

Training Information

Institution/Hospital Name: **Friends of the Family**
Institution/Hospital Address: **[Redacted]**
City: **[Redacted]**
Postal Code: **[Redacted]**
Country: **[Redacted]**
Fax:
End Date: **10/1997**
Affiliated University

If not, please explain.
Institution/Hospital Name: **Valley Women's Center**
Institution/Hospital Address: **[Redacted]**
City: **[Redacted]**
Country: **[Redacted]**
Fax:
End Date: **02/1998**
If not, please explain.

Department: **Psychotherapy**
Suite/Building #: **[Redacted]**
State: **[Redacted]**
Province: **[Redacted]**
Phone: **[Redacted]**
State Date: **11/1995**
Program Director Name: **[Redacted]**
Did you complete the training program at this institution? **Yes**
Dept: **Psychotherapy**
Suite/Building #: **[Redacted]**
State: **[Redacted]**
Province: **[Redacted]**
Phone: **[Redacted]**
Start Date: **07/1996**
Program Director Name:
Did you complete the training program at this institution: **Yes**
Do you have Fellowship training? **No**

Specialty Information

Primary Specialty:
Marriage & Family Therapist
Primary Specialty Initial Certification Date:
01/12/1999
Expiration Date (if applicable): **01/12/2012**

Do you wish to be listed in the directory under this primary specialty:
By PPO: **Yes**
Name of Certifying Board: **Other, Not Listed**
Do you have a Secondary Specialty: **No**
Do you have any Additional Specialties?
No

Board Certified? **Yes**
Last Recertification Date (if applicable):
01/12/2010

Do you wish to be listed in the directory under this primary specialty? By HMO:
Yes
Do you wish to be listed in the directory under this primary specialty? By POS:
Yes
Reason not taking boards:

Certification Information

Basic Life Support (BLS): **No**	BLS Expiration Date:
Advanced Cardiac Life Support (ACLS): **No**	ACLS Expiration Date:
Advanced Life Support in OB (ALSO): **No**	ALSO Expiration Date:
Pediatric Advanced Life Support (PALS): **No**	PALS Expiration Date:
Advanced Trauma Life Support (ATLS): **No**	ATLS Expiration Date:
Neonatal Advanced Life Support (NALS): **No**	NALS Expiration Date:
CPR – Cardio-Pulmonary Resuscitation: **No**	CPR Expiration Date:

Credentialing Information

Credentialing Contact:
Last Name: **Baldini**
Middle Initial: **D**
Address 2:
State: **[Redacted]**
Phone: **[Redacted]**
Email: **[Redacted]**

First Name: **Vanessa**
Address: **[Redacted]**
City: **[Redacted]**
Zip Code: **[Redacted]**
Fax:

Practice Locations

Physician Group/Practice Name to appear in directory: **Baldini**
Suite, Department, etc. **[Redacted]**
State: **[Redacted]**
ZIP+4: **[Redacted]**
Office Fax Number:
Please indicate if this is your primary office location: **Primary Practice**
What type of practice? **Solo**
Tax ID: **61-5014611**
Group Name:

Office Street Address: **[Redacted]**
City: **[Redacted]**
ZIP Code: **[Redacted]**
Office Phone Number: **[Redacted]**
Office E-mail Address: **[Redacted]**
Can general correspondence be sent to this location? **Yes**

Type of Tax ID: **Individual**
Is this the Primary Tax ID for this practice location? **Yes**
Enter previous or future start date.

Currently practicing at this address? **Yes**
After Hours, back office phone number for health plan business use only:
New Patients? **Yes**
All new patients? **Yes**
New payor existing patients? **Yes**
New patients w/referral? **Yes**
New Medicare patients? **No**
New Medicaid patients? **No**
Does this information vary by health plan? **No**

If yes, please provide explanation below:

Monday Office Hours:
Tuesday Office Hours:
Wednesday Office Hours:
Thursday Office Hours:
Friday Office Hours:
Saturday Office Hours:
Sunday Office Hours:

Do you have any Partners/Associates at this location? **No**
Partner:
24x7 Phone Coverage at this location? **No**
Phone Coverage type:
Voice Mail Other
Office Manager:
Last Name: **Baldini**
Middle Initial: **D**
Fax Number:
Billing Contact:
Last Name: **Baldini**
Middle Initial: **D**
Suite, Department, etc.
[Redacted]
State: **[Redacted]**
Phone Number:
[Redacted]
E-mail Address:
[Redacted]
Payment Contact:
Are there any Practice Limitations? **No**
Age Limitations? **No**
Meet ADA req? **No**
Does this office provide handicapped accessibility?
No
Building: **No**
Parking: **No**
Restroom? **No**

First Name: **Vanessa**
Phone Number:
[Redacted]
E-mail Address:
[Redacted]
First Name: **Vanessa**
Street Address:
[Redacted]
City: **[Redacted]**
ZIP Code: **[Redacted]**
Fax Number

Minimum Age Limitations:
Other Limitation Description:

Is this office accessible by public transportation? **No**
Bus: **No**
Subway: **No**
Regional Train: **No**
Other Transportation: Other Transportation Access: **car**
Does this office have other services for the disabled? **No**
Text Telephony – TTY: **No**
American Sign Language – ASL: **No**
Mental/Physical Impairment Services: **No**
Other Disability Services: Other Disability Services: **none**
Do you have any mid-level practitioners at this location? **No**
Non-English languages spoken by office personnel: **Spanish** Interpreters Available? **No**
Lab Services? **No** Accrediting/Certifying Program (e.g. CLIA, COLA, MLE, AAFP, CAP, etc):
X-Ray Certification Type:

Radiology Services? **No**
EKG Services? **No**
Care of Minor
Lacerations? **No**
Pulmonary Function
testing? **No**
Allergy injections? **No**
Allergy Skin testing? **No**
Office Gynecology? **No**
Drawing Blood? **No**
Age Appropriate
immunizations? **No**
Flexible Sigmoidoscopy?
No
Tympanometry/
Audiometry Screening?**No**
Asthma treatment? **No**
Osteopathic
Manipulation? **No**
IV hydration
Treatment? **No**
Cardiac Stress Test? **No**
Physical Therapy? **No**
Additional Office
Procedures (including
surgical)? **None**
Is anesthesia admin-
istered in your office? **No**
Anesthesia Administered
by Last Name:

What class/category of
anesthesia is used?
none
Anesthesia Admin-
istered by First Name:

Hospital Information

Do you have hospital privileges? **No**

Admitting Arrangements: **none**

Insurance Information

Self-Insured? **Yes**

Address: **[Redacted]**
City: **[Redacted]**
Postal Code: **[Redacted]**
Policy Number: **PHCPE36449**
Current Effective Date: **07/2011**
Individual Coverage: **Yes**
Do you have unlimited coverage with this insurance carrier? **No**
Amount of coverage aggregate? **$3,000,000.00**
Country: **United States**

Carrier/Self Insured Name: **Allied Professionals Insurance Company**

Suite/Building #: **[Redacted]**
State: **[Redacted]**
Phone Number:
Original Effective Date: **07/2008**
Current Expiration Date: **07/2012**
Tail Coverage: **No**
Amount of coverage per occurrence: **$1,000,000.00**

Province:

Work History Information

Practice/Employer Name: **Self Employed**
Suite/Building #:
State: **[Redacted]**
Start Date: **09/2007**
Province:
Phone: **[Redacted]**
Reason for departure:

Address: **[Redacted]**
City: **[Redacted]**
Postal Code: **[Redacted]**
End Date:
Country: **United States**

Practice/Employer Name: **Didi Hirsch Community Mental Health Center**
Suite/Building #: **[Redacted]**
State: **[Redacted]**
Start Date: **10/1997**
Province:
Phone: **[Redacted]**
Reason for departure: **[Redacted]**

Address: **[Redacted]**
City: **[Redacted]**
Postal Code: **[Redacted]**
End Date: **10/2007**
Country: **[Redacted]**
Fax:

Do you have any work history gaps greater than 3 months? **No**

Are you currently on active military duty or on military reserve? **No**

References Information

First Name: **[Redacted]**
Address: **[Redacted]**
City: **[Redacted]**
Postal Code: **[Redacted]**
Province: **[Redacted]**
Phone: **[Redacted]**

Last Name: **[Redacted]**
Suite/Building # **[Redacted]**
State: **[Redacted]**
Provider Type: **Marriage/Family Therapist**
Country: **[Redacted]**
Fax: **[Redacted]**

First Name: **[Redacted]**
Address: **[Redacted]**
City: **[Redacted]**
Postal Code: **[Redacted]**
Province: **[Redacted]**
Phone: **[Redacted]**

Last Name: **[Redacted]**
Suite/Building #: **[Redacted]**
State: **[Redacted]**
Provider Type: **Clinical Social Worker**
Country: **United States**
Fax:

First Name: **[Redacted]**
Address: **[Redacted]**
City: **[Redacted]**
Postal Code: **[Redacted]**
Province: **[Redacted]**
Phone: **[Redacted]**

Last Name: **[Redacted]**
Suite/Building #: **[Redacted]**
State: **[Redacted]**
Provider Type: **Clinical Social Worker**
Country: **United States**

Disclosure information

18. Has your license, registration or certification to practice in your profession ever been voluntarily or involuntarily relinquished, denied, suspended, revoked, restricted, or have you ever been subject to a fine, reprimand, consent order, probation or any conditions or limitations by any state or professional licensing, registration or certification board? **No**

If Yes, please provide an explanation below.

19. Has there been any challenge to your licensure, registration or certification? **No**

If Yes, please provide an explanation below.

20. Have your clinical privileges or medical staff membership at any hospital or healthcare institution, voluntarily or involuntarily, ever been denied, suspended, revoked, restricted, denied renewal or subject to probationary or to other disciplinary conditions (for reasons other than non-completion of medical record when quality of care was not adversely affected) or have proceedings toward any of those ends been instituted or recommended by any hospital or healthcare institution, medical staff or committee, or governing board? **No**

If Yes, please provide an explanation below.

21. Have you voluntarily or involuntarily surrendered, limited your privileges or not reapplied for privileges while under investigation? **No**

If Yes, please provide an explanation below.

22. Have you ever been terminated for cause or not renewed for cause from participation, or been subject to any disciplinary action, by any managed care

organizations (including HMOs, PPOs, or provider organizations such as IPAs, PHOs)? **No**

If Yes, please provide an explanation below.

23. Were you ever placed on probation, disciplined, formally reprimanded, suspended or asked to resign during internship, residency, fellowship, preceptorship or other clinical education program? If you are currently in a training program, have you been placed on probation, disciplined, formally reprimanded, suspended or asked to resign? **No**

If Yes, please provide an explanation below.

24. Have you ever, while under investigation or to avoid an investigation, voluntarily withdrawn or prematurely terminated your status as a student or employee in any internship, residency, fellowship, preceptorship, or other clinical education program? **No**

If Yes, please provide an explanation below.

25. Have any of your board certifications or eligibility ever been revoked? **No**

If Yes, please provide an explanation below.

26. Have you ever chosen not to re-certify or voluntarily surrendered your board certification(s) while under investigation? **No**

If Yes, please provide an explanation below.

27. Have your Federal DEA and/or State Controlled Dangerous Substances (CDS) certificate(s) or authorization(s) ever been challenged, denied, suspended, revoked, restricted, denied renewal, or voluntarily or involuntarily relinquished? **No**

If Yes, please provide an explanation below,

28. Have you ever been disciplined, excluded from, debarred, suspended, reprimanded, sanctioned, censured, disqualified or otherwise restricted in regard to participation in the Medicare or Medicaid program, or in regard to other federal or state governmental health care plans or programs? **No**

If Yes, please provide an explanation below.

29. Are you currently the subject of an investigation by any hospital, licensing authority, DEA or CDS authorizing entities, education or training program, Medicare or Medicaid program, or any other private, federal or state health program or a defendant in any civil action that is reasonably related to your qualifications, competence, functions, or duties as a medical professional for alleged fraud, an act of violence, child abuse or a sexual offence or sexual misconduct? **No**

If Yes, please provide an explanation below.

30. To your knowledge, has information pertaining to you ever been reported to the National Practitioner Data Bank or Healthcare Integrity end Protection Data Bank? **No**

If Yes, please provide an explanation below.

31. Have you ever received sanctions from or are you currently the subject of investigation by any regulatory agencies (e.g., CL1A, OSHA etc.)? **No**

If Yes, please provide an explanation below.

32. Have you ever been convicted of, pled guilty to, pled nolo contendere to, sanctioned, reprimanded,

restricted, disciplined or resigned in exchange for no investigation or adverse action within the last ten years for sexual harassment or other illegal misconduct? **No**

If Yes, please provide an explanation below.

33. Are you currently being investigated or have you ever been sanctioned, reprimanded, or cautioned by a military hospital, facility, or agency, or voluntarily terminated or resigned while under investigation or in exchange for no investigation by a hospital or healthcare facility of any military agency? **No**

If Yes, please provide an explanation below.

34. Has your professional liability coverage ever been cancelled, restricted, declined or not renewed by the carrier based on your individual liability history? **No**

If Yes, please provide an explanation below.

35. Have you ever been assessed a surcharge, or rated in a high-risk class for your specialty, by your professional liability insurance carrier, based on your individual liability history? **No**

If Yes, please provide an explanation below.

36. Have you ever had any professional liability actions (pending, settled, arbitrated, mediated or litigated) within the past 10 years? **No**

If yes, provide information for each case.

37. Have you ever been convicted of, pled guilty to, or pled nolo contendere to any felony? **No**

If Yes, please provide an explanation below.

38. In the past ten years have you been convicted of, pled guilty to, or pled nolo contendere to any misdemeanor (excluding minor traffic violations) or been found liable or responsible for any civil offense that is reasonably related to your qualifications, competence, functions, or duties as a medical professional, or for fraud, an act of violence, child abuse or a sexual offence or sexual misconduct? **No**

If Yes, please provide an explanation below.

39. Have you ever been court-martialed for actions related to your duties as a medical professional? **No**

If Yes, please provide an explanation below.

40. Are you currently engaged in the illegal use of drugs? ('Currently' means sufficiently recent to justify a reasonable belief that the use of drug may have an ongoing impact on one's ability to practice medicine. It is not limited to the day of, or within a matter of days or weeks before the date of application, rather that it has occurred recently enough to indicate the individual is actively engaged in such conduct. 'Illegal use of drugs' refers to drugs whose possession or distribution is unlawful under the Controlled Substances Act, 21 U.S.C. 812.22. It 'does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the controlled Substances Act or other provision of Federal law.' The term does include, however, the unlawful use of prescription controlled substances.): **No**

If Yes, please provide an explanation below.

41. Do you use any chemical substances that would in any way impair or limit your ability to practice medicine and perform the functions of your job with reasonable skill and safety? No

If Yes, please provide an explanation below.

42. Do you have any reason to believe that you would pose a risk to the safety or well being of your patients? No

If Yes, please provide an explanation below

43. Are you unable to perform the essential functions of a practitioner in your area of practice even with reasonable accommodation? No

Standard Authorization, Attestation and Release

(Not for Use for Employment Purposes)

I understand and agree that, as part of the credentialing application process for participation, membership and/or clinical privileges (hereinafter, referred to as 'Participation') at or with each healthcare organization indicated on the 'List of Authorized Organizations' that accompanies this Provider Application (hereinafter, each healthcare organization on the 'List of Authorized Organizations' is individually referred to as the 'Entity'), and any of the Entity's affiliated entities, I am required to provide sufficient and accurate information for a proper evaluation of my current licensure, relevant training and/or experience, clinical compliance, health status, character, ethics, and any other criteria used by the Entity for determining initial and ongoing eligibility for Participation. Each Entity and its representatives, employees and agent(s) acknowledge that the information obtained relating to the application process will be held confidential to the extent permitted by law.

I acknowledge that each Entity has its own criteria for acceptance, and I may be accepted or rejected by each independently, I further acknowledge and understand that my cooperation in obtaining information and my consent to the release of information do not guarantee that any Entity will grant me clinical privileges or contract with me as a provider of services. I understand that my application for Participation with the Entity is not an application

for employment with the Entity and that acceptance of my application by the Entity will not result in my employment by the Entity.

Authorization of Investigation Concerning Application for Participation. I authorize the following individuals including, without limitation, the Entity, its representatives, employees, and/or designated agent(s); the Entity's affiliated entities and their representatives, employees, and/or designated agents; and the Entity's designated professional credentials verification organization (collectively referred to as 'Agents') to investigate information, which includes both oral and written statements, records, and documents, concerning my application for Participation, I agree to allow the Entity and/or its Agent(s) to inspect and copy all records and documents relating to such an investigation.

Authorization of Third-Party Sources to Release Information Concerning Application for Participation. I authorize any third party, including, but not limited to, individuals, agencies, medical groups responsible for credentials verification, corporations, companies, employers, former employers, hospitals, health plans, health maintenance organizations, managed care organizations, law enforcement or licensing agencies, insurance companies, educational and other institutions, military services, medical credentialing and accreditation agencies, professional medical societies, the Federation of State Medical Boards, the National Practitioner Data Bank, and the Health Care Integrity and Protection Data Bank, to release

to the Entity and/or its Agent(s), information, including otherwise privileged or confidential information, concerning my professional qualifications, credentials, clinical competence, quality assurance and utilization data, character, mental condition, physical condition, alcohol or chemical dependency diagnosis and treatment, ethics, behavior, or any other matter reasonably having a bearing on my qualifications for Participation in, or with the Entity. I authorize my current and past professional liability carrier(s) to release my history of claims that have been made and/or are currently pending against me. I specifically waive written notice from any entities and individuals who provide information based upon this Authorization, Attestation and Release.

Authorization of Release and Exchange of Disciplinary Information. I hereby further authorize any third party at which I currently have Participation or had Participation and/or each third party's agents to release 'Disciplinary Information,' as defined below, to the Entity and/or its Agent(s). I hereby further authorize the Agent(s) to release Disciplinary Information about any disciplinary action taken against me to its participating Entities at which I have Participation, and as may be otherwise required by law. As used herein, 'Disciplinary Information' means information concerning (i) any action taken by such health care organization, their administrators, or their medical or other committees to revoke, deny, suspend, restrict, or condition my Participation or impose a corrective action plan (ii) any other disciplinary action involving me, including, but not limited to, discipline in the

employment context; or (iii) my resignation prior to the conclusion of any disciplinary proceedings or prior to the commencement of formal charges, but after I have knowledge that such formal charges were being (or are being) contemplated and/or were (or are) in preparation.

Release from Liability. I release from liability and hold harmless any Entity, its Agent(s), and any other third party for their acts performed in good faith and without malice unless such acts are due to the gross negligence or willful misconduct of the Entity, its Agent(s), or other third party in connection with the gathering, release and exchange of, and reliance upon, information used in accordance with this Authorization, Attestation and Release. I further agree not to sue any Entity, any Agent(s), or any other third party for their acts, defamation or any other claims based on statements made in good faith and without malice or misconduct of such Entity, Agent(s) or third party in connection with the credentialing process. This release shall be in addition to, and in no way shall limit, any other applicable immunities provided by law for peer review and credentialing activities. In this Authorization, Attestation and Release, all references to the Entity, its Agent(s), and/or other third party include their respective employees, directors, officers, advisors, counsel, and agents. The Entity or any of its affiliates or agents retains the right to allow access to the application information for purposes of a credentialing audit to customers and/or their auditors to the extent required in connection with an audit of the credentialing processes and provided that the customer and/or their auditor executes an appropriate confidentiality

agreement. I understand and agree that this Authorization, Attestation and Release is irrevocable for any period during which I am an applicant for Participation at an Entity, a member of an Entity's medical or health care staff, or a participating provider of an Entity. I agree to execute another form of consent if law or regulation limits the application of this irrevocable authorization. I understand that my failure to promptly provide another consent may be grounds for termination of Participation at or with the Entity. I agree that information obtained in accordance with the provisions of this Authorization, Attestation and Release is not and will not be a violation of my privacy.

I certify that all information provided by me in my application is current, true, correct, accurate and complete to the best of my knowledge and belief, and is furnished in good faith. I will notify the Entity and/or its Agent(s) within 10 days of any material changes to the information (including any changes/challenges to license, DEA, insurance, malpractice claims, NPDB/HIPDB reports, discipline, criminal convictions, etc.) I have provided in my application or authorized to be released pursuant to the credentialing process. I understand that corrections to the application are permitted at any time prior to a determination of Participation by the Entity, and must be submitted online or in writing, and must be dated and signed by me (may be a written or an electronic signature). I acknowledge that the Entity will not process an application until they deem it to be a complete application and that I am responsible to provide a complete application and to produce adequate and timely information for

resolving questions that arise in the application process. I understand and agree that any material misstatement or omission in the application may constitute grounds for withdrawal of the application from consideration; denial or revocation of Participation; and/or immediate suspension or termination of Participation. This action may be disclosed to the Entity and/or its Agent(s). I further acknowledge that I have read and understand the foregoing Authorization, Attestation and Release and that I have access to the bylaws of applicable medical staff organizations and agree to abide by these bylaws, rules and regulations. I understand and agree that a facsimile or photocopy of this Authorization, Attestation and Release shall be as effective as the original.

_____ _____

Signature Name (print)

Date signed:
[10/24/11]

Pages 1 - 29

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Susan Illston

THOMAS ZABOROWSKI, VANESSA BALDINI, KIM DALE, NANCY PADDOCK, MARIA HOWARD, AND TIM PLATT, on behalf of themselves and all others similarly situated.

Plaintiffs,

VS.

MHN GOVERNMENT SERVICES, INC. and MANAGED HEALTH NETWORK, INC.,
Defendants

NO. C 12-5109 SI

San Francisco, California
Friday, March 15, 2013
10:03 A.M.

TRANSCRIPT OF PROCEEDINGS

Appearances:

For Plaintiffs

BARON AND BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, Texas 75219

By: Allen R. Vaught, Esquire

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street
29th Floor
San Francisco, California 94111

By: Kelly M. Dermody, Esquire
Jahan C. Sagafi, Esquire

(Further appearances on following page)

Reported by: Joan Marie Columbini, CSR 5435, RPR; Official Court Reporter, U.S. District Court

Appearances (continued):

For Defendants

ORRICK, HERRINGTON & SUTCLIFFE, LLP
400 Capitol Mall
Suite 3000
Sacramento, California 95814

By: Timothy J. Long, Esquire
Lauri A. Damrell, Esquire

Proceedings; Friday, March 15, 2013, 10:03 A.M.

The Clerk: Civil 12-5109, Zaborowski versus MHN.

I'm sorry; I didn't see that.

Please state your appearances.

Mr. Long: Tim Long for the Defendant MHN Government Services, et al.

The Court: Good morning.

Ms. Damrell: Good morning, your Honor. Lauri Damrell, also for MHN.

The Court: Good morning.

Mr. Vaught: Good Morning, your Honor. Allen Vaught for the Plaintiffs.

The Court: Good morning.

Mr. Sagafi: Good morning, your Honor. Jahan Sagafi from Lieff, Cabraser, Heiman & Bernstein for the Plaintiffs. With me I have my partner Kelly Dermody.

Ms. Dermody: Good morning, your Honor.

The Court: Good Morning. This is defendant's Motion to Compel arbitration, which is coming on for hearing at long last. I am curious. I noted in somebody's papers that oral argument in the *Brown* case is this week. Has it happened?

Mr. Long: Yes, your Honor.

The Court: When?

Mr. Long: On Tuesday, your Honor. I argued it.

The Court: Okay. How did it go?

Mr. Long: I think it went very well.

The Court: Well, do we have any idea when they might rule?

Mr. Long: In another arbitration case, albeit with facts much more onerous to that defendant, the Court issued -- much more onerous, your Honor.

The Court: Yeah.

Mr. Long: If memory serves me, the Court heard the motion in January, issued a ruling in February. Beyond that, it would be speculation.

The Court: All right. Well, I have pretty much decided that I'm going to decide this motion. It's been brought. It's been briefed and rebriefed and supplementally briefed, so I can't really justify not deciding it at this point.

I had originally thought if we got a prompt reading from the state court in Washington, it would be informative, but at this point I think I better go ahead and decide the motion. So, you can argue it. You can present it on that basis. I have read what's

been presented, and, in my view, the motion should be denied.

I think that the agreements that I've reviewed are both procedural and substantively unconscionable in many different respects, so that's where I'm starting.

You may want to go first, Mr. Long.

Mr. Long: Thank you, your Honor. Context is important here, context both with regard to the background of law, *Concepcion* and the other cases issued by the U.S. Supreme Court, as well as other Courts interpreting procedural unconscionability arguments as well as substantive unconscionability arguments.

Context is also important in understanding the agreement and how it's used. This is a situation where MHN contracts with highly skilled, highly trained, sophisticated behavioral healthcare professionals who are also highly compensated. This isn't a situation, for example, like some labor case where you had an employer who imposed upon Spanish-speaking individuals contracts that were 11 pages long on pain of being terminated with no opportunity to review and, in a situation there, where the individuals had asked for the agreement to be in Spanish and were refused.

This is straightforward agreement, nothing uncommon, particularly in the healthcare industry. They were given all the time in the world. There's nothing in the Record --

The Court: Let's say they wanted to strike the arbitration provision, could they have done that?

Mr. Long: Perhaps.

The Court: What good does the time do them?

Mr. Long: Pardon me?

The Court: What good does the time do them if they didn't have the option to change any of the terms?

Mr. Long: Well, I think the time, in the first instance, gives them the opportunity to evaluate whether they want to take on the short-term assignments to supplement their own practices. That's the first thing.

Second, there's no evidence in the record that the plaintiffs have submitted that they would have been prevented from negotiating any terms or what have you.

And the burden here is not on the Defendant to prove procedural unconscionability or substantive unconscionability. So they have failed to –

The Court: Conscionability you mean?

Mr. Long: Unconscionability.

The Court: You don't have to prove unconscionability. Of course, you don't want it to be -

Mr. Long: I understand what you're saying, and you're correct.

But, in this instance, there's no such evidence. And I would say, your Honor, there is not only policy that MHN has with regard to considering changes, there's actually a history of changes that have occurred when people have raised issues. It's not specific to the arbitration agreement, but it's specific to other agreements that it has with providers. And if the Court is interested in that type of evidence, I would be happy to submit a supplemental declaration pointing out not only the policy, but the instances where MHN has changed and negotiated provisions.

As I said, that's the plaintiff's burden. It is not our burden, and they haven't carried that burden. There is no surprise to the agreement. This is put in front of them. They considered it. They evaluated it. They accepted it. There is no procedural unconscionability on these facts and this record. And if there's no procedural unconscionability, put everything else aside, period, end of story.

But even if the court were to find some level of unconscionability on the procedural side, I think on this record it's very small. So that raises the burden with regard to substantive unconscionability.

I am not going to go through every single one of our arguments, but what we provided to the court is either a case or a point of law for each of the points they have raised, the growing number of points that they've raised, of what is purportedly substantive

unconscionability, and we've provided you with authority to say, no, it's not.

And this is important, because one of the teaching points from *Concepcion* to all the courts is: rather than look for ways not to enforce arbitration agreements, because consistent with the underlying principle of the FAA, that principle is to enforce the parties' expectations when they agree upon a streamlined proceeding to resolve their disputes.

And how important is that in this instance? These are short-term assignments in which these healthcare professionals are going out and rendering counseling services to members of the military and their family.

There needs to be -- and it is appropriate to have a mechanism that allows for disputes that might arise to be resolved in an informal, fast, efficient method. That's again where context matters.

Another really important part of context is the application of the American Arbitration rules. So they've taken issue, for example, with the selection of the arbitrator's provision. The arbitration agreement makes it very clear that selection of the arbitrator will be pursuant to the rules of the AAA. Likewise, that the arbitrator has to be neutral.

And when you read those provisions in the context of the rules if the American Arbitration Association, which has, for example, the due process protocol -- I think it's number six -- the notion that

leaves to AAA the ability to sua sponte, or upon a motion of any party, to disqualify an arbitrator, makes it very clear in this instance that where an arbitrator's selected to resolve a dispute, that arbitrator selected by, in this case, one of the plaintiffs, that allows for a neutral, fair resolution of disputes.

And that's one other point, your Honor. No one's disputing the fairness of the AAA rules or the process. That hasn't been called into issue at all. And that's important because, again, the parties agreed on a process that would allow for dispute resolution.

And my final point is this: The dispute resolution process at issue comes into play in a variety of contexts.

So, for example, one issue they've taken us on is with regard to the limitation on punitive damages. Well, that works in a mutually beneficial way for both, because, for example, if one of the providers misrepresented his or her credentials and wasn't capable of counseling people who had gone to war, and then compounded things by failing to give a warning when they're otherwise required to do so, and that led to tort liability to MHN, MHN's ability to recover punitive damages from the provider, obviously, is limited.

And I give that as an example to the Court that for each and every one of these provisions, they're mutually beneficial. That was the final point on substantive unconscionability.

The final, final point is severability.

The purpose of this contract, the arbitration agreement, was to allow the parties to resolve their differences in an expedited fashion. That's not an unlawful purpose. In fact, there really hasn't been any allegation that that person is unlawful, and that's important because if one looks at California authorities, the one case, *MKB Management Company*, talked about unless there's an unlawful purpose for this, courts can and should sever provisions that trouble the court to allow the arbitration, in this instance, to go forward. And that's consistent not only with California law, which clearly applies here, but also the purposes enunciated by the Supreme Court and the purposes under the FAA, to allow and find a way for arbitration proceedings to go forward to uphold the expectations of the parties.

So, unless the court has any other questions...

The Court: Thank you.

Mr. Long: Thank you, your Honor.

Mr. Sagafi: Good morning, your Honor. I will be happy to answer any questions, but I would like to just address a few of the comments from my colleague, Mr. Long.

We certainly agree the FAA governs and *Concepcion* governs, but *Concepcion* preserves state court unconscionability analysis. This is an issue of California contract law interpretation. And while

there is a liberal policy in favor of arbitration where it's appropriate, there is also, under California contract law, the requirement that the contract be construed against the drafter under Civil Code 1654.

And here I would differ with Mr. Long's characterization of the relationship. We have workers who are in allegedly an independent contractor relationship and were asserting that they are actually treated as employees. But these are not highly sophisticated workers like some of the workers in the cases that were cited by MHN.

For example, they have a case in which an executive is suing for $5 Million worth of stock against his employer. That's a relationship where there may be parity or the worker may be on superior footing. But we have declaration evidence from both of the two lead plaintiffs, Mr. Zaborowski and Ms. Baldini, that testify to the fact that they were given these form adhesive contracts on a take-it-or-leave-it basis. They were not given the opportunity to negotiate.

Mr. Long has said perhaps they could have negotiated the agreements. We have no evidence and no reason to believe that in a form agreement like this it could have been negotiated.

Although they are assigned by MHN to short-term assignments, they are employed where they have this work relationship for very long periods of time. So MHN will move them from Kansas, to Texas, to California, to Alaska in stints, but they will be

consecutively employed for long periods of time. They are dependent on MHN for that employment.

The Court: He said that these were short-term assignments to augment their income from their other pursuits; is that correct?

Mr. Sagafi: That's not the reality as experienced by the people we have talked to, and we already have, I believe, 14 people that have opted into the class. We have six named plaintiffs and eight opt-in parties.

They will be assigned by MHN to work at a base for several months, a couple of months, a month and a half, but then they will be moved to other locations. So, several of the plaintiffs have been employed consecutively for three and a half years, that length of time. They are effectively not able to participate in any other employment.

There's a little bit of ambiguity as to whether they are absolutely prohibited from engaging in any other employment, but MHN imposes significant restrictions on their ability to market, and, as a practical matter, because they are working 40, 50, 60 hours a week on a military base, away from home, away from their family, not allowed to see their family, not allowed to see their friends, they are working exclusively for MHN in practice at the very least.

The Court: I thought you had said in your papers that they were precluded in some way from doing other work?

Mr. Sagafi: They are precluded from marketing their services. And because they are also -- because they are generally licensed in -- they are licensed in one particular state. So, for example, I believe it's Mr. Zaborowski is licensed in Minnesota. He applied to work when he was living in Nevada, and he was able to work for MHN outside of Minnesota because MHN doesn't require him to be licensed in any particular state; it just requires him to be licensed.

Does that answer your question?

The Court: No.

Mr. Sagafi: Whether they are precluded from other employment?

The Court: Right. Perhaps I'm remembering wrong, but I thought I read that in here somewhere. I want to make sure if I did that it's correct.

Mr. Sagafi: Yes, your honor. In Mr. Zaborowski's affidavit, which is docket number 29-1, I believe, he quotes the provider manual, the MHN provider manual, which prohibits, on page 37 in paragraph 6.20, 'offering or marketing any personal business services or self-promotion.' so, that, effectively, prevents them from that. That coupled with the time that they spend devoted to doing the job

MHN has assigned them prevents them from doing any other work.

The Court: Okay. Maybe that's what I'm remembering. All right. It's not that they can't work for somebody else at the same time; it's just they can't market themselves or market their services?

Mr. Sagafi: I don't believe we have evidence yet, and, of course, we haven't begun discovery, but - so, this is only the handful of documents we've gotten from our clients and conversations.

So, I don't believe we have an absolute prohibition on performing one's own work. We do have very strong practical prohibitions on marketing and then the logistics of the fact that you spend all your time doing this.

In reality, we haven't -- in any of these conversations, we have no evidence of anyone ever doing any other work for anyone else.

Then, of course, because they're working, they are assigned by MHN to work on a particular base in a state that 49 out of 50 times is not going to be the one they're licensed in, they are not going to be able to do that work.

I would just take issue with one other item that Mr. Long said about the substantive unconscionability arguments. He said that MHN's briefing has a case on every issue. I don't want to belabor this, because it's so incredibly

unconscionable, the extensive examples that we cited, but there are several items on which MHN provided no authority. On the filing fees and the costs, there's no authority by MHN. On the punitive damages, they cited that one *Monex* Case, which we distinguished. On the statute of limitations, there's extensive authority, including *Pokorny* and *Davis* from the Ninth Circuit, that rejects that position that you can divide—that you practically decimate the statute of limitations from four years down to six months. And I won't waste the Court's time on that.

The pool of arbitrators -- also Mr. Long mentioned the arbitrator is selected by the plaintiff. We explained in our briefing that that is not a real choice. When MHN has the ability to chose [sic] three arbitrators from anywhere in the world -- it doesn't have to be AAA. They are hoping we can read into the arbitration agreement that it has to come from AAA, but nothing in that paragraph says the arbitrators have to come from AAA. It just stays arbitration will be conducted according to AAA rules.

AAA's rules in many respects defer to the decision or the agreement of the parties. Their employment rules explicitly say they will defer to a selection, and that includes the selection of the arbitrator. So, if the arbitrator, even in AAA -- if an arbitrator, applying AAA rules, is from outside of AAA, they still are allowed to proceed under that agreement.

So, MHN can pick its three favorite arbitrators, and then hand them over to the plaintiff to choose

which of the three least evils it chooses, but that's not a real choice, and that was rejected in other courts.

He did say that nobody disputes the fairness of the AAA rules, and we certainly agree with that. The AAA rules are not at issue here. But before you get to the AAA rules, that's where you find the unconscionability.

And the last comment that he made is that if the purpose is merely for expedited resolution, then it's not for an unlawful purpose, then it should be upheld. And, as a general principle, that, of course, is true. But given substantive unconscionability to reduce statute of limitations to non-mutually, in practice, eliminate punitive damages to impose the fee and cost shifting -- or to undo the fee and cost shifting rules of California law and federal law, that is an unlawful purpose that has been recognized by many courts.

And so, his last point was on severability, and we cited several cases empowering the court to find the entire clause unenforceable, and none of those cases have as many problems as this arbitration agreement does.

So, *Armendariz* had two substantive unconscionability elements, limitations on punitive damages and non-mutuality, and it said that if it were to just sever, that would encourage parties to overreach. Of course, that's what MHN has done. And having gotten its hand caught in the cookie jar, it should not be allowed to just rewrite the agreement.

In *Davis* there were four elements. In *Ingle*, there were seven elements. In *Wherry*, w-h-e-r-r-y, there were three substantive unconscionable elements, and it was found to be rife with unconscionability. So if you have three unconscionable elements and it's rife with unconscionability -- this one has eight, as well as the procedural elements, and that is not a candidate where the court should assume the role of contract author or drafter. It's merely interpreting the contract. And in the words of the Ninth Circuit in *Armendariz* -- excuse me -- the courts in *Armendariz* and the Ninth Circuit in *Ingle*, the court should not play that role.

The Court: Okay. Thank you.

Mr. Sagafi: Your honor, if we are done with arbitration, I do have one housekeeping matter.

The Court: Before you get to that, I have one question for Mr. Long.

Mr. Sagafi: Yes, your honor.

The Court: The complaint alleges, and somewhere in these papers it is alluded to, that since these cases began, the counselors have been reclassified from independent contractors to employees; is that correct?

Mr. Long: There's a new contract with the government, and pursuant to –

The Court: With the government, okay. Between your client and the Government?

Mr. Long: Correct.

The Court: And it --

Mr. Long: This dispute arises under a prior contract that the client had with the Department of Defense. Since that time there's been a new contract changing many aspects of the program, including, you know, the services that are provided, the conditions, et cetera, and pursuant to the new contract there's both a mix of employee counselors and independent contractor counselors.

The Court: Does the contract with the United States government instruct your client how it ought to classify these folks?

Mr. Long: I suspect that depends on one's perspective. Let me just say to that point that the government has been intimately involved under the Prior contract -- and I'll speak to that because that's what's at issue here -- with regard to how relationships were structured, the conditions of those relationships. The government got the benefit of all of those relationships as well.

So, from our perspective, the Government knew from stem to stern how these relationships were structured and, as I said, received the benefit of that.

The Court: Okay. Thank you. Now, you had a housekeeping—

Mr. Long: Your honor, if I Could, just a few points? And I'll keep it short. But just to round out, for example, this issue on self-promotion. I have a copy of that full contract.

The limitation on self-promotion is to -- they're prohibited from offering or marketing any personal services or products to military personnel, family members, or their civilian staff, which makes sense. I mean, they are out on a military installation providing services. The Government -- and this is something that's imposed by the Government, as I understand it -- says you can't market yourself to them. That's the only limitation.

Two, with regard to being invited versus being told, MHN invites these folks to do these short stints. It isn't a situation where they're assigned and they can decline. So to be really clear about this, they are not assigned; they are invited on this thing.

With regard to other opportunities to work, the parties have submitted factual declarations from Ms. Baldini -- with regard to Ms. Baldini and Mr. Zaborowski, and they both represented to MHN that they had a private practice and were providing independent consulting services. So, this was in addition to.

Starting with responding to our arguments, there was the point made that contracts are construed against the drafter. I think that conflates two issues.

To the extent that there's any dispute about the interpretation of a term, the U.S. Supreme Court has been clear in saying in that instance, that's the type of situation which a Court should compel that matter to arbitration.

And the *Pacific Care Health* case was a good example of this. This point was picked up by Judge Jones up in Washington in a post-*Concepcion* case, the *Adams* case which we cited, in which there was some ambiguity. And rather than construing it against the drafter, that court said that's an issue for the arbitrator to decide.

But it's contrary -- in the context of when you are talking about contracts and arbitration, again, the Court has said that courts should find ways to interpret this in a way that allows for the parties to preserve what they have agreed upon, an expedited, streamlined process to resolve their disputes.

You know, there was some discussion about some of the provisions. There was mention about a six-month limitation. It's not a limitation, your Honor. We've never interpreted it as such. It's a timing mechanism.

The Court: What's the difference between a timing mechanism and a limitation?

Mr. Long: First of all, is there anything per se inappropriate with that? And I think it was Judge Chesney in the *Perez* case said no, and that arose in a

wage and hour classification in an exemption case. She actually enforced it.

Two, the difference is this: if you timely file your claim, you can recover whatever -- whatever your claim is. So to use the plaintiff's theory on this, if they have a right to recover up to four years of back wages under California law, as long as the claim is timely filed, then they can recover up to four years.

And, again, it's a mutually beneficial provision that makes sense in this context. If somebody does a stint in Abu Dhabi or Djibouti [sic]- -- there's a place in Africa that they –

The Court: Djibouti. That's the one that starts with a 'd,' right?

Mr. Long: Yep. That's the one I was thinking of, not Abu Dhabi.

If there's a dispute that arises as a result of that stint there, doesn't it make sense for both parties to say, raise that dispute promptly. It makes sense in this context. Then if you look at the arbitration agreement, what does one need to do?

The Court: Come to San Francisco, among other things.

Mr. Long: Ultimately, if the parties can't, in the first instance, resolve their disputes informally, there's a built-in meet and confer process.

And in terms of coming to San Francisco, they contact AAA. And it does make sense to have somebody in San Francisco. Why? First of all, California law controls. Why not have a practitioner who understands California law that will apply to any of the disputes here?

Two -- and I know this is a little bit glib. I have never heard anyone accuse San Francisco as being a venue that's been hostile to plaintiffs, and so I think that bodes well. But it also common sensibly makes sense, because that is -- here MHN is headquartered here. So with regard to evidence, there might be people who may be testifying. It makes sense to allow that.

Also, the AAA rules allow a great deal of flexibility. There's no requirement, for example, to have a California practitioner, or even a practitioner, represent the plaintiff. They can bring in counsel from anywhere.

Two, to the extent that one would submit the matter on the papers, or with documents, or do things by telephone or video, the AAA allows for all of that. So, it's very convenient and very user friendly, which brings me to my final point.

Counsel agree the AAA rules are fair, and they bring a context to this. So to the point of -- for example, on the arbitrator's selection process, the AAA rules are unequivocal. They will not countenance any sort of arbitration that is not presided over by a neutral arbitrator.

This arbitration agreement is subject to those rules. So, while one could interpret the selection process in a nefarious way, there's a backstop. The AAA rules, plus the arbitration agreement, which says the arbitrator must be neutral.

As I started --

The Court: it does say. just by the by, that the arbitrator shall have no authority to add to, modify, or refuse to enforce any agreements between parties, presumably meaning the contract. So what you're talking about could be construed as importing other terms into the contract which the arbitrator isn't allowed to do.

Mr. Long: I understand that argument, which is one of the arguments that the plaintiffs have made, that the arbitrator can't deviate from the contract, would eviscerate the whole notion of an arbitration agreement, and reads out another important part, that the arbitrator has the power to resolve any controversy among the parties, whether in contract, tort, or otherwise. That's what it's there for.

In this instance, you have claims about whether people were properly classified and what have you. The arbitrator is fully empowered to resolve that, and the language in the arbitration agreement, I think, really is a tortured reading to get to the point of the arbitrator couldn't determine, for example, that these people were improperly classified and entitled to overtime.

That is clearly -- the arbitrator can resolve any controversy related to this agreement, and there's a controversy. We are not saying you can't -- I mean, we've never taken the position that the arbitration agreement would prevent the arbitrator from resolving this dispute or any other dispute that comes between the parties. It just provides a process. It provides a process, a fair one, and in the context of this case, it's appropriate.

So...

The Court: Thank you.

Mr. Long: Thank you, your Honor. You have a housekeeping issue?

The Court: Housekeeping?

Mr. Sagafi: Sure. We have that kind of relationship. We can stand at the podium together.

I'm sorry. One issue that Mr. Long mentioned. He said the claims arise under the old contract and not the new contract. Obviously, the claims arise under California labor code and the FLSA. They don't arise under a particular contract.

So we may -- we are still trying to learn, and we have been educated by just what Mr. Long said about what's going on with this changing relationship, and so we may need to amend the complaint to include that, and we have been working cooperatively with MHN's counsel do that.

The housekeeping issue is somewhat related, which has to do with the brief that we filed -- the motion that we filed last night, and we do not expect the court –

The Court: I haven't actually studied it.

Mr. Sagafi: You don't even have a paper copy of it yet.

Your Honor, we don't expect to get to the merits of it, but I wanted to explain, we moved for FSLA certification, which I recognize is very unusual timing.

But because we just learned about this reclassification a few weeks ago, and we just learned about how MHN, while a parallel case in Washington State Court, the one that was just argued in the Supreme Court this week, was on appeal last year, MHN went out and interviewed all, or substantially all, of the Washington class members, which highlighted for us the danger that the class members face.

If this court denies the motion and rules in our favor, we expect MHN to immediately appeal, and this court, we believe, will likely be divested of jurisdiction very quickly, and we will have to wait the two or three years while the Ninth Circuit addresses that appeal. During that time the class members' statutes will be running, absent tolling, and perhaps more importantly, the evidence that they have in documents and their own memories of the hours that they've worked, the duties that they performed, the

control that MHN has exercised over them will deteriorate month after month.

The Court: Let's get back to the appeal part.

Mr. Sagafi: Yes, your Honor.

The Court: Let's say I -- you're saying if I deny motion, deny the motion to dismiss, then what now?

Mr. Sagafi: Then, under the FAA, MHN has the right to appeal –

The Court: That ruling. And does that divest me of jurisdiction?

Mr. Sagafi: It is a little bit unclear. I think there may be some way for you to retain jurisdiction of the case, but, from what I understand, it's very rare.

The Court: It's rare you are going to fool around doing a lot of work on a case if it's up there, I grant you that.

Mr. Sagafi: Well, you've seen from our supplemental briefing –

The Court: What I'm thinking of is this: there are other ways -- like if you either do or don't certify a class, there are all sorts of interlocutory appellate opportunities these days. I did not understand they would divest the court of jurisdiction like a real appeal would. Maybe this does. I don't know.

Mr. Sagafi: I don't know if Mr. Long has an opinion on that, and I have been trying to research it along with everything else we have been doing to push this case along. My understanding is in the vast majority of cases the district court is not able to hold on to the case, and it is stayed by the appellate court pending that resolution.

So, on the basis of that danger, I am concerned that in the two-year period, the statutes will run. Especially in light of the reclassification, there may be changes in facts, and people will gradually forget how much work they did, what they did, what duties they performed. They will throw away e-mails. They will throw away evidence.

MHN is in the middle of litigation. MHN is not going to throw away any evidence. MHN is preparing for an eventual resolution on the merits, presumably. But the class members don't have that advantage because they don't know about the pendency of the case.

So we are -- we thought about what the best way to present this to the court was, and so we decided that an FLSA certification motion, which simply results in notice to the class, which doesn't prejudice MHN -- we go into it in our motion -- if the court were to defer ruling on arbitration for a month and a half that it takes for us to resolve FLSA certification, we would certainly appreciate that, because we think that would be fair to the class members, particularly in light of this new evidence we just learned about, that they went out and gathered

evidence in their own favor and acted in what the state court called an improper fashion. Even assuming they were going to act properly in this case, it still prejudices the class members.

An alternate way to approach it is if the court were just to order MHN to produce the class list to us now with names and contact information, we could contact them ourselves at our own cost and warn them to preserve their evidence.

Mr. Long: Well, as you might imagine, I have a somewhat different view, and I don't want to take the Court's time to go through all of the issues. I don't have an answer about whether the court would be divested of jurisdiction. That's something we can provide.

The Court: I know the stay issue always comes up, but jurisdiction is a different question, and I just don't know the answer to that.

Mr. Long: Your honor, to be candid, we would ask for a stay. We think it would be appropriate.

The Court: I understand what you would do.

Mr. Long: This is all putting the cart before the horse. One thing that's notably absent, you'll see in that arbitration agreement, is any reference to any sort of class or collective treatment.

The Court: I figured that too.

The Court: You made the argument that, therefore, it can't be done on a class basis anyway; you said that.

Mr. Long: So, allowing any sort of conditional certification or notice to putative class members and the like, particularly when you haven't asked them whether they want their private information to be given out, we think would be inappropriate. That's just been filed with the court. We'll deal with it in due course.

The Court: That's fine. All right.

Mr. Sagafi: Thank you.

The Court: The matter is submitted.

Oh, should there be any rulings of interest on the other places where this same case is pending, let me know.

Mr. Sagafi: Yes, your Honor, we will immediately do that.

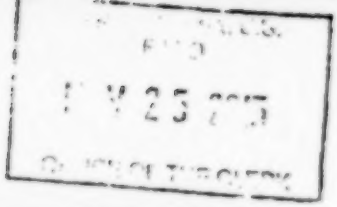
(Proceedings adjourned at 10:41 a.m.)

Certificate of Reporter

I, Joan Marie Columbini, official reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 12-5109 SI, Zaborowski, et al. v. MHN Government Services, et al., were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

/s/ Joan Marie Columbini, CSR 5435
Rpr Friday, April 26, 2013



No. 14-1458

IN THE

Supreme Court of the United States

MHN GOVERNMENT SERVICES, INC., AND
MANAGED HEALTH NETWORK, INC.,

Petitioners,

v.

THOMAS ZABOROWSKI, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

The Federal Arbitration Act (FAA) provides that an arbitration agreement shall be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2. California law applies one rule of contract severability to contracts in general, and a separate rule of contract severability to agreements to arbitrate. The arbitration-only rule disfavors arbitration and applies even when the agreement contains an express severability clause. Its application in this case conflicts with binding precedent of this Court and with opinions of four other courts of appeals.

The question presented is whether California's arbitration-only severability rule is preempted by the FAA.

CORPORATE DISCLOSURE STATEMENT

Petitioner MHN Government Services, Inc. is a wholly owned subsidiary of MHN Services. MHN Services is a wholly owned subsidiary of Petitioner Managed Health Network, Inc. Petitioner Managed Health Network, Inc. is a wholly owned subsidiary of Health Net, Inc., a publicly held corporation.

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OPINIONS BELOW

The district court's opinion (Pet. App. 12a-30a) is published at 936 F. Supp. 2d 1145 (N.D. Cal. 2013). The Ninth Circuit's divided decision (Pet. App. 1a-11a) is not published in the *Federal Reporter*, but is available at 601 F. App'x 461 (Dec. 17, 2014).

JURISDICTION

The Ninth Circuit denied rehearing and rehearing en banc on February 9, 2015. Pet. App. 31a. Subsequently, Justice Kennedy extended the time for filing a petition for a writ of certiorari to June 10, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, Art. VI, Cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

INTRODUCTION

In enacting the Federal Arbitration Act (FAA) in 1925, Congress sought to eliminate the "longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The FAA not only "declared a national policy favoring arbitration," but further "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

At its core, the FAA demands that States end their longstanding hostility to arbitration agreements and treat arbitration agreements like all other con-

tracts—no better, no worse. Section 2 declares that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. States and their courts must therefore "place arbitration agreements on an equal footing with other contracts." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011). No special rules—whether expressed by state statute or common law—may be applied to disfavor agreements to arbitrate. Equally, facially neutral rules cannot be applied in a manner that is hostile to arbitration. Thus, purportedly generally applicable contract defenses, such as unconscionability, are preempted if they are applied in a manner that subjects arbitration clauses to special scrutiny or that imposes heightened standards on arbitration agreements. *Id.* at 1747-48.

The California courts have demonstrated a long history of hostility to arbitration. California courts often mouth the proper FAA mandate, claiming that "under both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 755 (Cal. 2000) (footnote omitted). They say that all contracts are equal in their eyes. *Id.* at 777. These hollow assurances of equality are, however, reminiscent of George Orwell's *Animal Farm*. There, the central commandment that "all animals are equal" was later revised to expose the reality that under the regime of Leader, Comrade Napoleon, "all animals are equal, but some animals are more equal than others." George Orwell, Animal Farm 192 (1945). Similarly, in California, "all

contracts are equal," but arbitration agreements are "less equal" than other contracts.

The present case highlights the problem. In *Armendariz*, the California Supreme Court, while denying hostility to arbitration agreements, held that if an agreement to arbitrate contains "more than one" provision deemed "unlawful" by a court, that by itself is valid grounds for refusing to enforce the entire agreement. 6 P.3d at 696-97. The court explained: "[M]ultiple defects" in an "arbitration agreement" "indicate a systematic effort to impose arbitration ... not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage," and thus allow a court to find that the entire agreement is per se "permeated by an unlawful purpose." *Id.*

This rule applies only to agreements to arbitrate. No comparable rule exists for other contracts. Outside the context of arbitration agreements, no California rule holds that multiple unconscionable or illegal provisions in any contract indicate a systematic unlawful purpose and allow a court to refuse severance. To the contrary, outside of the context of arbitration, California courts express an overwhelming preference for contract enforcement. The courts strain to sever unenforceable terms where there is, otherwise, a meeting of the minds. Not so with the "less equal" agreements to arbitrate. They may simply be deemed irreparably tainted and held void.

California courts even apply the *Armendariz* multiple-defects rule where, as here, the parties agree to sever unenforceable terms. *Armendariz* thus

creates, and California courts routinely apply, a special legal rule for agreements to arbitrate that does not apply to contracts generally and that is hostile towards arbitration. That is precisely what § 2 of the FAA prohibits. This Court should reject that rule and the hostility to arbitration that it reflects. That arbitration agreements must be treated as equals to other contracts and respected by state courts is not simply an empty motto, but a directive of controlling federal law that must be respected by the California courts in word and in deed. The Supremacy Clause demands nothing less.

STATEMENT OF THE CASE

Petitioners Create The Military & Family Life Consultant Program.

In 2004, the U.S. Department of Defense (DoD) recognized the necessity for additional counseling services to support active duty service members and their families, who were struggling under the effects of extended and repeated deployments to Iraq and Afghanistan. JA156-57. To help address that need, DoD entered into contracts with Petitioner Managed Health Network, Inc., and subsequently its affiliate, Petitioner MHN Government Services (MHN).[1]

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[1] Managed Health Network, Inc., a behavioral health subsidiary of Health Net. Inc., partners with a nationwide provider network of over 55,000 licensed practitioners and 1,400 hospitals and care facilities to deliver clinically based workplace solutions to improve productivity for its clients. *See* https://www.mhn.com/content/about-us, incorporated by

Together, DoD and MHN "established a program to provide short-term, situational, problem-solving non-medical counseling services" designed to address issues that arise "within the military lifestyle and help Service members and their families cope with the normal reactions to the stressful/adverse situations created by deployment and reintegration." JA156. The program does not replace medical counseling services offered by DoD. Rather, it augments "existing military support services and meet[s] emerging needs" for active duty service members and their families. JA157.

DoD and MHN originally piloted the Military & Family Life Consultant Program (Program) to support families of soldiers in the 1st Armored Division. JA156. The Program quickly expanded around the world, and is currently run through the Office of the Secretary of Defense and the DoD's Office of Family Policy. JA157. Pursuant to its contracts with DoD, MHN partners with licensed clinical practitioners, credentialed by MHN. JA158. The practitioners join the Program to offer service members and their families access to support for "dealing with relationships, crisis intervention,

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reference in Respondents' complaint, JA32. MHN Government Services operates under several government contracts and partners with the providers in its network to provide access to "a broad range of behavioral health services to Active, Guard and Reserve service members and their families as well as to Veterans." *See* https://www.mhngs.com/app/aboutus/about_us.content, also incorporated by reference in Respondents' complaint, JA31.

stress management, family issues, parent-child communications," and family separations and reunions due to deployments. JA157-58. The support furnished by the Program "is an integral part of ... assur[ing] that personal and family issues do not detract from operational readiness." JA158.

The settings in which practitioners serve can vary widely. JA169. Some engagements are "on demand" and last no more than a few days, while others are rotational, with rotations up to 90 days through military bases around the world. JA167-77.

To qualify to participate in the Program, practitioners must meet the same credentialing requirements as those who participate in MHN's commercial provider network. JA203-04. This includes having a graduate degree and a valid state license as an independent behavioral health care practitioner. JA250-51, 255. Providers eligible for network participation are psychologists, social workers, professional counselors, marriage family therapists, and registered nurses with psychiatric specialties. JA251.

Respondents Contract With MHN To Serve As Independent Contractors.

Respondents Thomas Zaborowski and Vanessa Baldini each entered into separate contracts with MHN to serve as subcontractors eligible to perform work for the Military & Family Life Consultant Program. Pet. App. 12a. Respondent Zaborowski is a licensed psychologist

and clinical social worker. Prior to contracting with MHN, he was providing independent consulting services to mental health providers. JA264, 274. He had previously served in supervisory roles in various mental health facilities, providing leadership, education and training, and administration. JA274.

Respondent Baldini is a Board Certified Marriage and Family Therapist. Prior to contracting with MHN, she had her own private counseling practice. JA284, 290.

To participate in the MHN network, both Zaborowski and Baldini reviewed and signed a Provider Services Task Order Agreement. Pet. App. 33a-60a. The Agreement provides that Respondents "shall deliver or arrange" "short term, situational, problem solving non-medical counseling support services" as detailed in "Task Orders" to be issued by MHN, depending on the needs of the DoD. Pet. App. 33a.

The Task Orders set forth the terms and conditions of the proposed engagements. Upon receipt of a Task Order, Providers have two business days in which to accept or decline the specific engagement. Pet. App. 39a. For example, Mr. Zaborowski received a Task Order for a rotation in Fort Riley, Kansas from May 31, 2011 until August 5, 2011 for which he would be paid up to $42,110. JA105-06.

In their contract with MHN, Respondents agreed to maintain professional liability insurance in

the amount of $1 million, and to ensure that "any and all subcontractors" they hired to fulfill the specific Task Orders were similarly insured. Pet. App. 34a-35a. The contract specifically defines the nature of the relationship between Respondents and MHN: "MHN and Provider are independent contractors in relation to one another and no joint venture, partnership, employment, agency or other relationship is created by this Agreement." Pet. App. 52a. In addition, "[n]either of the parties hereto, nor any of their respective officers, agents or employees shall be construed to be the officer, agent or employee of the other party." *Id.*

As part of the contract with MHN, both Zaborowski and Baldini separately agreed to arbitrate any disputes that might arise under the contract. Captioned "**Mandatory Arbitration**" in bold underlined text, and written in the same typeface and typesize as the rest of the contract, the arbitration clause provides, in full:

> **Mandatory Arbitration**. The parties agree to meet and confer in good faith to resolve any problems or disputes that may arise under this Agreement. Such negotiation shall be a condition precedent to the filing of any arbitration demand by either party. The parties agree that any controversy or claim arising out of or relating to this Agreement ... or breach thereof, whether involving a claim in tort, contract or otherwise, shall be settled

by final and binding arbitration in accordance with the provisions of the American Arbitration Association. The parties waive their right to a jury or court trial. The arbitration shall be conducted in San Francisco, California. A single, neutral arbitrator who is licensed to practice law shall conduct the arbitration. The complaining party serving a written demand for arbitration upon the other party initiates these arbitration proceedings. The written demand shall contain a detailed statement of the matter and facts supporting the demand and include copies of all related documents. MHN shall provide Provider with a list of three neutral arbitrators from which Provider shall select its choice of arbitrator for the arbitration. Each party shall have the right to take the deposition of one individual and any expert witness designated by another party. At least thirty (30) days before the arbitration, the parties must exchange lists of witnesses, including any experts (one each for MHN and Provider), and copies of all exhibits to be used at the arbitration. Arbitration must be initiated within 6 months after the alleged controversy or claim occurred by submitting a written demand to the other party. The failure to initiate

> arbitration within that period constitutes an absolute bar to the institution of any proceedings. Judgment upon the award rendered by the arbitrator may be entered in any court having competent jurisdiction. The decision of the arbitrator shall be final and binding. The arbitrator shall have no authority to make material errors of law or to award punitive damages or to add to, modify or refuse to enforce any agreements between the parties. The arbitrator shall make findings of fact and conclusions of law and shall have no authority to make any award that could not have been made by a court of law. The prevailing party, or substantially prevailing party's costs of arbitration, are to be borne by the other party, including reasonable attorney's fees.

Id. at 55a-57a.

Additionally, the contracts signed by Respondents contain an express severability clause. Captioned "**Severability**," the clause is written in the same typeface and typesize as the rest of the contract. Pet. App. 53a. It provides that if "any provision of this Agreement is rendered invalid or unenforceable ... the remaining provisions of this Agreement shall remain in full force and effect." *Id.*

The District Court Permits Respondents To Ignore Their Arbitration Agreement And File A Putative Class-Action Lawsuit In Court.

Despite the "**Mandatory Arbitration**" provision, Respondents filed a putative class-action lawsuit in district court against Petitioners, alleging violations of the Fair Labor Standards Act and various state laws. JA18-104. Specifically, the complaint alleged that Military & Family Life Consultants (MFLCs) should have been classified as employees, not independent contractors, and that, as employees under the Fair Labor Standards Act, they were entitled to overtime pay. JA21-22.

Consistent with the terms of the Agreement, Petitioners moved to compel arbitration. Respondents opposed. Applying California law, the district court concluded that the arbitration agreement was procedurally unconscionable because it was a contract of adhesion, MHN was in a "superior bargaining position to the individual MFL Consultants," and the arbitration agreement was not "set apart from the rest of the agreement in any way." Pet. App. 17a-19a. The district court also held that multiple provisions in the arbitration agreement were substantively unconscionable. Pet. App. 19a-28a. First, the court concluded that the provision requiring that "[a]rbitration ... be initiated within 6 months after the alleged controversy or claim occurred" was unconscionable. According to the court, the provision did not give Respondents enough time to discover that they were being treated as independent contractors instead of employees, Pet. App. 20a-21a. The court so held even though the Agreement Respond-

ents signed spells this out explicitly, Pet. App. 52a-53a.

The court also deemed the arbitrator selection provision unconscionable because it read the provision to unduly favor MHN. Pet App. 21a. Next, the court found that, even though Respondents were suing for more than $75,000, potential responsibility for the standard American Arbitration Association ("AAA") $2600 filing fee was unconscionable because it was more than "seven times greater" than the $375 filing fee in the Northern District of California. Pet. App. 23a-24a.

The court also deemed the Agreement's fee-shifting provision unconscionable because it did not mirror federal or state laws applicable to employees (despite the fact that it was not established that Respondents were employees) and "could be disproportionately burdensome to plaintiffs." Pet. App. 24a-25a. Finally, the court deemed the punitive damages restriction unconscionable, Pet. App. 25a-26a, even though the Fair Labor Standards Act does not provide for punitive damages, *see Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) ("the liquidated damage provision is not penal in its nature"), and only plaintiffs from Kentucky and North Carolina requested punitive damages at all. *See* JA86, 96-97

Though Respondents did not challenge the agreement's severability clause, the district court ignored the clause altogether and refused to sever the purportedly unconscionable provisions. The district court observed that, under California law, a court may decline a request to sever when the contract "is

permeated by unconscionability." Pet. App. 29a (internal quotation marks omitted). The court noted, however, that under *Armendariz*, when the contract at issue is an arbitration agreement, "[t]he finding of 'multiple unlawful provisions' allows a trial court to conclude that 'the arbitration agreement is permeated by an unlawful purpose'" and to therefore refuse to enforce the agreement in its entirety. *Id.* (quoting *Armendariz*, 6 P.3d at 697). Without any examination of whether or how the unenforceable terms truly permeated the agreement or whether there was still a meeting of the minds reflected in the remaining terms, the district court invalidated the entire arbitration agreement. *Id.* at 30a.

A Divided Ninth Circuit Panel Affirms.

A divided panel of the Ninth Circuit affirmed. The majority of the panel agreed that the arbitration agreement was procedurally unconscionable, and multiple provisions were substantively unconscionable. Pet. App. 2a-4a. It also upheld the district court's denial of severance. According to the majority, "[u]nder generally applicable severance principles, California courts refuse to sever when multiple provisions of the contract permeate the entire agreement with unconscionability." Pet. App. 5a. Like the district court, the panel majority relied on a California case that held: "An arbitration agreement can be considered permeated by unconscionability if it contains more than one unlawful provision .... Such multiple defects indicate a systematic effort to impose arbitration ... not simply as an alternative to litigation, but as an inferior forum that works to the [stronger party's] advantage." *Samaniego v. Empire*

Today, LLC, 140 Cal. Rptr. 3d 492, 501 (Cal. Ct. App. 2012) (alteration in original, internal quotation marks and citations omitted), *cited in* Pet. App. 5a.

Judge Gould dissented. He noted that two provisions were "arguably not unconscionable and apparently entered into in good faith." *Id.* at 10a, n.1. In any event, Judge Gould would have held that "[t]he reasoning in *Armendariz* that multiple unconscionable provisions will render an arbitration agreement's purpose unlawful has 'a disproportionate impact on arbitration agreements' and should have been preempted [by the FAA]." *Id.* at 8a (quoting *Concepcion*, 131 S. Ct. at 1747).

According to Judge Gould, "*Concepcion* and its progeny should create a presumption in favor of severance when an arbitration agreement contains a relatively small number of unconscionable provisions that can be meaningfully severed and after severing the unconscionable provisions, the arbitration agreement can still be enforced." *Id.* Applying the appropriate and arbitration-neutral test, Judge Gould found that severance should have been granted, and Respondents held to their basic promise to arbitrate rather than litigate. Judge Gould even included a redline mark-up of the arbitration agreement, *id.* at 8a-10a, demonstrating graphically that "if all the unconscionable provisions of the arbitration agreement, as determined by the district court and affirmed by th[e] panel, were severed ... the remainder of the arbitration agreement can still be enforced, and the district court need not assume the role of contract author." *Id.* at 8a (internal quotation marks omitted).

SUMMARY OF THE ARGUMENT

I. The FAA was enacted to end judicial hostility to arbitration and require all courts to enforce arbitration agreements according to their terms. Section 2 declares that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

At its core, the FAA demands that states impose no greater requirements on the enforceability of arbitration agreements than they do on other contracts. This Court has thus held that § 2 preempts arbitration-specific rules, or state-law rules that single out arbitration agreements and are hostile to them. The same is true when courts apply generally applicable contract defenses, such as unconscionability, in ways that subject arbitration clauses to special scrutiny or that impose heightened standards on arbitration agreements.

This Court has accordingly struck down state-law rules that impose special barriers on the enforcement of arbitration agreements or assess the enforceability of arbitration provisions according to rules that do not apply to contracts generally. It is irrelevant whether the state law rule that treats arbitration differently arises in the legislature or in a state court. Instead, only generally applicable contract defenses, that are applied in the same way for agreements to arbitrate as for contracts in general, survive § 2.

II.A. California courts apply a more stringent

rule to severing unconscionable or illegal terms in arbitration agreements than they do to severing unconscionable or illegal provisions in contracts generally. Like the laws of most states, California law expresses an overwhelming preference for contract enforcement. California law generally prohibits a court from voiding a contract unless the entire purpose of the contract is unlawful. Thus, California courts normally strain to enforce the lawful contractual provisions to which the parties agreed, while severing only those provisions found to be unlawful. Moreover, for contracts generally, California courts respect express severability clauses, reflecting the parties' intent to enforce their agreement even if individual terms are held unenforceable.

B. In stark contrast, California courts have long applied a different rule, favoring the nonenforcement of agreements to arbitrate. In *Armendariz*, "the California Supreme Court held that more than one unlawful provision in an arbitration agreement weighs against severance," *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 106 (Cal. Ct. App. 2004), because where an "arbitration agreement," but not any other contract, "contains more than one unlawful provision," that in and of itself "indicate[s] a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." *Armendariz*, 6 P.3d at 696-97. Therefore, a California court can, on that basis alone, find the entire agreement permeated by an unlawful purpose.

Following the lead of *Armendariz*, the California courts have for 15 years repeatedly found that

the existence of two or more "defects" in an arbitration agreement is per se "a circumstance considered by [the California] Supreme Court to 'permeate' the agreement with unconscionability." *Trivedi v. Curexo Tech. Corp.*, 116 Cal. Rptr. 3d 804, 813 (Cal. Ct. App. 2010). The courts candidly admit that while severance is appropriate "where only one clause in an arbitration agreement [is] found to be substantively unconscionable," it is "not appropriate" where "multiple provisions" are found substantively unconscionable. *Pinela v. Neiman Marcus Grp., Inc.*, 190 Cal. Rptr. 3d 159, 183-84 (Cal. Ct. App. 2015), *reh'g denied* (July 29, 2015), *review denied*, 2015 Cal. LEXIS 6186 (Sept. 16, 2015). The *Armendariz* rule persists even in cases such as this one, where the parties agree to a severability clause expressing their clear intent to have any invalid terms excised from the agreement.

The *Armendariz* multiple-defects rule is not a general principle of California contract law; instead, it is unique and adverse to arbitration agreements. First, it applies only to agreements to arbitrate—it has never been applied to evaluate the enforceability of any other type of contract. Second, it sets a much lower bar for declining to enforce arbitration agreements than contracts generally.

C. At bottom, the *Armendariz* multiple-defects rule is grounded in the assumption that arbitration is an "inferior" mechanism for dispute resolution. *Armendariz* repeatedly highlights what it sees as the "potential disadvantages" and "inherent shortcomings of arbitration." 6 P.3d at 690-91. The entire premise of *Armendariz* is that arbitration agree-

ments are inherently suspect and that illegal or unconscionable provisions in an arbitration agreement are somehow more egregious than in other contracts. And *Armendariz* is not the first or only time the California Supreme Court has expressed hostility to arbitration. Instead, the court is notorious for imposing conditions on the enforcement of arbitration agreements that do not apply to contracts generally, and that reflect ongoing and repeated hostility towards arbitration.

III. California's discriminatory severance rule is preempted by the FAA. No similar rule applies to contracts generally. There is no rule that more than one unconscionable or illegal provision in any other contract indicates a systematic effort to take advantage of the weaker party, and therefore automatically allows a court to throw out the entire contract as permeated by an unlawful purpose. The multiple-defects rule holds agreements to arbitrate invalid on grounds that do not exist for the revocation of any contract. It construes agreements to arbitrate different from nonarbitration agreements, and singles out arbitration agreements for suspect treatment. Thus, as Judge Gould correctly concluded, it is preempted by the FAA. Pet. App. 8a.

This is especially clear for a contract with a severability clause. The FAA embodies an overarching federal policy of enforcing agreements to arbitrate according to their terms. Where parties include severability clauses, they obviously intend for any unenforceable provisions to be severed. California courts recognize that when it comes to contracts generally, but not when it comes to arbitration

agreements. And the district court and Ninth Circuit ignored the severability clause in this case altogether. The judgment of the Ninth Circuit must therefore be reversed.

ARGUMENT

The FAA broadly preempts all state-law rules unique and hostile to agreements to arbitrate. § I. California courts apply one severability rule to contracts in general, favoring contract enforcement and severing invalid terms whenever possible. But California courts improperly apply a different, hostile rule to agreements to arbitrate—a rule favoring the nonenforcement of such agreements. In agreements to arbitrate, but not in other contracts, the mere fact of multiple defects allows a court to hold the entire arbitration agreement invalid, without any case-specific analysis of whether the unenforceable terms truly permeate the contract or whether they can be severed, leaving behind a fully functional arbitration agreement. § II. The California arbitration-only severance rule is unquestionably hostile to arbitration agreements and is preempted by the FAA. § III.

I. The FAA Preempts State Laws Unique And Hostile To Arbitration.

A. The FAA reflects an emphatic federal policy favoring arbitration.

"The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *Concepcion*, 131 S. Ct. at 1745. For centuries, English and American courts routinely refused

to enforce agreements to arbitrate. Their hostility "manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." *Id.* at 1747 (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)). Some devices were explicit. Under the "ouster" doctrine, for example, courts held arbitration agreements "void as an attempt to oust the courts of jurisdiction." *Lewis v. Bhd. Accident Co.*, 194 Mass. 1, 4 (1907); *see also Cal. Annual Conference of Methodist Episcopal Church v. Seitz*, 15 P 839, 841 (1887); *Bozeman v. Gilbert*, 1 Ala. 90, 91 (1840); H.R. Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924) ("[C]enturies ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate[.] This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts."). Thus, in 1874, this Court held that although a person "may submit his particular suit by his own consent to an arbitration .... agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void." *Home Ins. Co. of N.Y. v. Morse*, 87 U.S. 445, 451 (1874).

Other forms of hostility toward arbitration agreements were couched in generally applicable principles. If arbitration agreements were treated as binding, courts reasoned, "the strong could oppress the weak, and in effect so nullify the law as to secure the enforcement of contracts usurious, illegal, immoral, or contrary to public policy." *Parsons v. Ambos*, 121 Ga. 98, 101 (1904); *see also* Arbitration of Interstate Commercial Disputes: Joint Hearings on

S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong. 15 (1924) (statement of Julius Henry Cohen, Member, Bar Ass'n Comm. on Commerce, Trade & Commercial Law; General Counsel, N.Y. State Chamber of Commerce) (stating that the "real fundamental cause" of judicial hostility to arbitration agreements "was that ... people were not able to take care of themselves in making contracts, and the stronger men would take advantage of the weaker, and the courts had to come in and protect them").

Formal legislative efforts to overrule judicial hostility to arbitration began in earnest in the early twentieth century, culminating in the passage of the Federal Arbitration Act of 1925. 9 U.S.C. §§ 1-16. "The FAA was enacted as remedial legislation intended to thwart judicial hostility to arbitration and force courts to assess the enforceability of arbitration agreements just as they do all other contractual provisions." Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach To Arbitration: Why This Road Less Traveled Will Make All The Difference On The Issue Of Preemption Under The Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 65 (2005).

The FAA "reflects an emphatic federal policy in favor of arbitral dispute resolution." *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (per curiam) (citation and internal quotation marks omitted). It also "reflects the overarching principle that arbitration is a matter of contract." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

Section 2, the Act's "centerpiece provision," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625 (1985), declares that:

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Consistent with the text of § 2, "courts must 'rigorously enforce' arbitration agreements." *Am. Express Co.*, 133 S.Ct. at 2309 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). Moreover, the FAA "creat[es] a body of federal substantive law of arbitrability" that is "applicable to any arbitration agreement within the coverage of the act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Section 2's reach is "expansive[,]...coinciding with that of the Commerce Clause." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274 (1995); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111-121 (2001); *Southland Corp.*, 465 U.S. at 12. The substantive law established by the FAA applies in state and federal court alike, and the FAA has broad preemptive force. *Southland Corp.*, 465 U.S. at 12.

"The 'principal purpose' of [§ 2 of] the FAA is

to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" *Concepcion*, 131 S. Ct. at 1748 (quoting *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 478 (1989)). Accordingly, while "§ 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* Instead, "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone*, 460 U.S. at 24. That liberal policy is reinforced by § 4 of the FAA, which states that "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement" unless "the making of the agreement" to arbitrate is challenged. 9 U.S.C. § 4.

B. The FAA preempts state-law rules that discriminate against and disfavor arbitration.

The FAA broadly preempts three different types of state laws. *First*, "when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion*, 131 S. Ct. at 1747. This Court has thus held that the FAA preempts a California rule prohibiting arbitration of wage disputes. *See Perry v. Thomas*, 482 U.S. 483, 491 (1987).

Second, generally applicable state-law rules that require "procedures that are incompatible with

arbitration" are also preempted. *See Concepcion*, 131 S. Ct. at 1748 (citation omitted). This Court therefore struck down a California common law rule "requiring the availability of classwide arbitration" because it "interfere[d] with fundamental attributes of arbitration." *Id.*

Third, and most relevant here, the FAA preempts state rules, whether codified in legislation or a creation of common law, that treat agreements to arbitrate differently than other contracts. *See* 9 U.S.C § 2; *Preston v. Ferrer*, 552 U.S. 346, 356 (2008). Simply stated, state courts may not discriminate against arbitration agreements and may not single "out arbitration provisions for suspect status." *Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

As this Court explained in *Perry v. Thomas*, "state law ... is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." 482 U.S. at 492 n.9 (emphasis in original). But "[a] state law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue" does not comport with the plain language of § 2 of the FAA. *Id.* Hence a court may neither construe an arbitration agreement "in a manner different from that in which it otherwise construes nonarbitration agreements under state law," *id.*, nor "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable[.]" *Id.* It is irrelevant whether the discriminatory state-law rule is "of legislative or judicial origin"—otherwise a court would be able to "effect what ... the

state legislature cannot." *Id.* The same is true "when a doctrine normally thought to be generally applicable, such as ... unconscionability" is "applied in a fashion that disfavors arbitration." *Concepcion*, 131 S. Ct. at 1747-48. Thus, courts may not apply state-law doctrines of general applicability in ways that subject arbitration clauses to disfavored treatment. *Id.* "That a state decision employs a general principle of contract law, such as unconscionability, is not always sufficient to ensure that the state-law rule is valid under the FAA. Even when using doctrines of general applicability, state courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny." *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004).

This Court has accordingly struck down state-law rules that impose special barriers on the enforcement of arbitration agreements or assess the enforceability of arbitration provisions according to rules that do not apply to contracts generally. In *Preston v. Ferrer*, this Court struck down a California statute that permitted the arbitration of disputes between artists and "talent agents" only if the State Labor Commissioner was provided with notice and an opportunity to attend all arbitration hearings. 552 U.S. at 355-56. This Court easily concluded that such a requirement stood in "conflict with the FAA's dispute resolution regime" because it "impose[d] prerequisites to enforcement of an arbitration agreement that [were] not applicable to contracts generally." *Id.* at 356 (citing *Doctor's Associates*, 517 U.S. at 687).

Similarly, in *Doctor's Associates*, a Montana statute required that "[n]otice that [the] contract is subject to arbitration" be "typed in underlined capital letters on the first page of the contract." 517 U.S. at 683 (citation and internal quotation marks omitted). The Court held that "Montana's first-page notice requirement, which governs not 'any contract,' but specifically and solely contracts 'subject to arbitration,' conflicts with the FAA," and was therefore preempted. *Id.*

The Court began by observing that, although § 2's savings clause preserves generally applicable contract defenses, "[c]ourts may not ... invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Id.* at 687. Section 2 "preclude[s] States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Id.* (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). Here, the Montana law conditioned the enforceability of agreements to arbitrate on compliance with special "requirement[s] not applicable to contracts generally," placing agreements to arbitrate "in a class apart from 'any contract." *Id.* at 687-88. It was therefore preempted by the FAA.

Taken together, this Court's decisions stand for the unqualified proposition that state courts may not impose heightened standards or rules on arbitration agreements or treat such agreements as a suspect class. Instead, only generally applicable contract defenses, that are applied in the same way for agreements to arbitrate as for contracts in gen-

eral, survive § 2. This anti-discrimination principle stands at the core of the FAA.

II. California Courts Embrace A Severability Rule Unique And Hostile To Arbitration Agreements.

A. For contracts generally, California courts exhibit a strong preference for severing unenforceable terms and enforcing the remaining agreement.

Like most states, California generally expresses an overwhelming preference for contract enforcement. California law generally prohibits a court from voiding a contract unless the entire purpose of the contract is unlawful. This longstanding common law rule was codified by statute in 1872: "Where a contract has but a single object, and such object is unlawful ... the entire contract is void." Cal. Civil Code § 1598. The statute continues, "[w]here a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." *Id.* at § 1599. When California codified the common law doctrine of unconscionability in 1979, it included a similar provision. *See id.* at § 1670.5 ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of

any unconscionable clause as to avoid any unconscionable result.").

California courts have thus consistently applied a strong preference for severance if possible, even "when the parties have contracted, in part, for something illegal." *Marathon Entm't, Inc. v. Blasi*, 174 P.3d 741, 750 (Cal. 2008). "Notwithstanding any such illegality," California generally "preserves and enforces any lawful portion of a parties' contract that feasibly may be severed." *Id.* at 750-51.

In deciding whether to sever illegal or unconscionable provisions in contracts generally, courts "look to the various purposes of the contract." *Id.* at 754 (citation omitted). The severability inquiry is "equitable and fact specific," and requires "case-by-case consideration" of whether severing the unenforceable terms is appropriate and feasible. *Id.* at 755. "If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." *Id.* at 754 (citation omitted). If, on the other hand, "the court is unable to distinguish between the lawful and unlawful parts of the agreement, the illegality taints the entire contract, and the entire transaction is illegal and unenforceable." *Birbrower, Montalbano, Condon & Frank v. Super. Ct.*, 949 P.2d 1, 12 (Cal. 1998) (citation and internal quotation marks omitted). Severance is thus appropriate unless "the central purpose of the contract is tainted with illegality." *Marathon*, 174 P.3d at 754 (citation omitted).

In *Mailand v. Burckle*, the California Supreme Court held that two separate provisions in a franchise agreement violated state antitrust laws. One provision allowed defendants to set the price of gasoline that plaintiffs sold; another required plaintiffs to purchase gasoline from a particular company. 572 P.2d 1142, 1144-45, 1152 (Cal. 1978). Yet the court expressly rejected "defendants' assertion that the entire franchise agreement must be declared void," relying on the settled rule "that partially illegal contracts may be upheld if the illegal portion is severable from the part which is legal." *Id.* at 1152. Because both illegal provisions could be severed "without undermining the essential objects of the agreement," the court refused to throw out the entire agreement. *Id.*

Similarly, in *A&M Produce Co. v. FMC Corp.*, the trial court ruled that two provisions, a waiver of warranties and an exclusion of consequential damages, were unconscionable. 186 Cal. Rptr. 114, 119-26 (Cal. Ct. App. 1982). Yet instead of throwing out the contract altogether, the trial court refused to enforce those two unconscionable provisions. *Id.* at 118-19. The Court of Appeals affirmed. *Id.* at 125-26; *see also Ilkhchooyi v. Best*, 45 Cal. Rptr. 2d 766, 776 (Cal. Ct. App. 1995) (where the trial court found that a profit-shifting clause was unconscionable, "the trial court had the power to strike that portion" of the lease; no discussion whatsoever of any power to refuse to enforce the entire contract).

Even where a contract appears to be indivisible, there is still a policy favoring severance. "California cases take a very liberal view of severability,

enforcing valid parts of an apparently indivisible contract where the interests of justice or the policy of the law would be furthered." *In re Marriage of Facter*, 152 Cal. Rptr. 3d 79, 95 (Cal. Ct. App. 2013) (quoting *Adair v. Stockton Unified Sch. Dist.*, 77 Cal. Rptr. 3d 62, 73 (Cal. Ct. App. 2008)). In *Birbrower*, the defendant law firm practiced law in California without a license. Although "substantial legal services" under the agreement had been performed illegally in California, the California Supreme Court held that the Court of Appeals erred in throwing out the entire agreement. Instead, if the law firm could prove that it generated fees for the "limited services" it provided legally in New York, it could recover those fees. 949 P.2d at 2-3, 12-13.

California courts have even rewritten contracts to avoid throwing them out entirely. For example, in *Carboni v. Arrospide*, 2 Cal. Rptr. 2d 845, 849 (Cal. Ct. App. 1991), the trial court held that a short term loan with an interest rate of 200% was substantively unconscionable. Yet instead of refusing to enforce the loan agreement altogether, the Court allowed interest at a rate of 24%, the "then prevailing [rate] in the credit market for similar loans." *Id.* at 846-47, 849. The Court of Appeals affirmed. *Id.* at 851.

Moreover, California courts generally show great respect for express severability clauses, respecting the parties' intent that unenforceable terms be severed while the rest of the agreement remains in force. In *California School Employees Ass'n v. Del Norte County Unified School District*, 4 Cal. Rptr. 2d 35 (Cal. Ct. App. 1992), a school district entered into

a contract with a private corporation to, among other things, supervise its custodial and maintenance employees. The trial court ruled that those portions of the contract violated the State Education Code. *Id.* at 36-37. The issue of severability had not been briefed, but the contract at issue contained an express severability clause, showing that "the parties clearly intended [the contract] to be severable." *Id.* at 37. In light of the clause, the Court held that only "those aspects of the contract that provide for ... regular supervision of employees, including ... giving orders to such employees, setting work schedules, authorizing overtime, approving timesheets," etc., were invalid and needed to be eliminated from the contract. *Id.* 37-38. As to other "services not specifically prohibited ... above," the contract continued and remained in force. *Id.* at 38.

Thus, for contracts generally, California law expresses an overwhelming preference for contract enforcement, and will generally sever any illegal or unconscionable provisions that can be feasibly severed.

B. For agreements to arbitrate, California courts apply a different rule, disfavoring severance.

In stark contrast, California courts have long applied a different rule, favoring the non-enforcement of agreements to arbitrate. In *Armendariz*, "the California Supreme Court held that more than one unlawful provision in an arbitration agreement weighs against severance." *Fitz*, 13 Cal. Rptr. 3d at 106 (refusing to sever two unconscionable

provisions, a limitation on discovery and an exemption from arbitration for disputes over confidentiality agreements and intellectual property rights). According to the California Supreme Court, where an "arbitration agreement," but not any other contract, "contains more than one" provision deemed unlawful or unconscionable by a court, that in and of itself "indicate[s] a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." *Armendariz*, 6 P.3d at 696-97. Therefore, a California court may, based only on there being two or more unenforceable terms, presume that the entire arbitration agreement is "permeated by an unlawful purpose" and simply refuse to enforce it. *Id.* at 697

Unsurprisingly, California courts of appeals have interpreted and applied *Armendariz* for the least 15 years to mean exactly what it says—the existence of even two substantively unconscionable provisions in an arbitration agreement is "a circumstance considered by [the California] Supreme Court to 'permeate' the agreement with unconscionability." *Trivedi*, 116 Cal. Rptr. 3d at 813. Or, in other words, "[a]n employment arbitration agreement can be considered permeated by unconscionability if it contains more than one unlawful provision." *Murphy v. Check 'N Go of Cal., Inc.*, 67 Cal. Rptr. 3d 120, 128-29 (Cal. Ct. App. 2007), as modified (Nov. 9, 2007) (citation and internal quotation marks omitted).

California courts of appeals candidly admit the mechanical nature of this arbitration-only rule. While severance is appropriate "where only one

clause in an arbitration agreement [is] found to be substantively unconscionable," it is "not appropriate" where "multiple provisions" are found unconscionable. *Pinela*, 190 Cal. Rptr. 3d at 183-84.

Often, the courts simply quote the language from *Armendariz* and summarily refuse to sever, without any of the detailed scrutiny of whether severance is appropriate and feasible that is required in other contexts. *See, e.g., Martinez v. Master Prot. Corp.*, 12 Cal. Rptr. 3d 663, 673 (Cal. Ct. App. 2004); *Ontiveros v. DHL Exp. (USA), Inc.*, 79 Cal. Rptr. 3d 471, 488-89 (Cal. Ct. App. 2008); *Lhotka v. Geographic Expeditions, Inc.*, 104 Cal. Rptr. 3d 844, 852-53 (2010). For example, in *Trivedi*, the court of appeals found two provisions in an arbitration agreement unconscionable: a provision allowing the prevailing party to recover attorney's fees, and a provision allowing both parties to seek provisional injunctive relief in court while arbitration proceedings were pending. 116 Cal. Rptr. 3d at 809-11. The court refused to sever because "an arbitration agreement can be considered permeated by unconscionability if it 'contains more than one unlawful provision.... Such multiple defects indicate a systematic effort to impose arbitration ... not simply as an alternative to litigation, but as an inferior forum that works to the [stronger party's] advantage." *Id.* at 812 (citations omitted).

In *Pinela*, likewise, the court's severance discussion was perfunctory, with no actual feasibility analysis. The court stated, in total:

> Severance was the correct solution in *Serafin* [*v. Balco Properties Ltd., LLC*, 185 Cal. Rptr. 3d 151, 160 (Cal. Ct. App. 2015)], where only one clause in an arbitration agreement was found to be substantively unconscionable, but in light of our determination that multiple provisions of the NMG Arbitration Agreement are substantively unconscionable here, we conclude that severance of the offending provisions is not appropriate. (*See Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal. App. 4th 74, 90, 171 Cal. Rptr. 3d 42 ["When an arbitration agreement contains multiple unconscionable provisions, '[s]uch multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage'"].) The unconscionability we have found permeates the NMG Arbitration Agreement to such a degree that severance would amount to re-writing the parties' contract, something we cannot do.

190 Cal. Rptr. 3d at 183-84.

Similarly, in *Martinez* the court found a cost-sharing provision; a provision exempting from arbitration claims for unfair competition, misuse of con-

fidential information, and trade secrets; and a shortened limitations period unconscionable. The court of appeals held that the trial court erred in granting the motion to compel arbitration:

> Such multiple defects indicate a systematic effort to impose arbitration on an employee ... as an inferior forum that works to the employer's advantage." [citing *Armendariz*]. The substantively unconscionable provisions cannot be cured by striking or limiting application of identifiable provisions. Rather, the arbitration agreement is so permeated by unconscionability [it] could only be saved, if at all, by a reformation beyond our authority.

12 Cal. Rptr. 3d at 673 (internal quotation marks and citations omitted).

Wherry v. Award, Inc. refused to enforce an arbitration agreement that the plaintiffs signed as part of an agreement to work as independent contractors for a real estate company. 123 Cal. Rptr. 3d 1, 6-7 (Cal. Ct. App. 2011). The unconscionable provisions included a clause allowing the arbitrator to award costs to the prevailing party, a clause awarding attorney fees to the prevailing party, and a shortened limitations period. *Id.* at 6-7. The court noted that "the general rule does favor arbitration." *Id.* at 8. However, it quoted the *Armendariz* multiple-defects rule, and summarily held that "[h]ere, based on the several unconscionable provisions de-

tailed above the arbitration agreement is so permeated by unconscionability [it] could only be saved, if at all, by a reformation beyond our authority." *Id.* at 7 (citations and internal quotation marks omitted). It therefore refused to sever. *Id. See also Pinedo v. Premium Tobacco Stores*, 102 Cal. Rptr. 2d 435, 440 (Cal. Ct. App. 2000) (refusing to sever and quoting *Armendariz's* multiple-provisions language); *Carmona*, 171 Cal. Rptr. 3d at 55 (same); *Mayers v. Volt Mgmt. Corp.*, 137 Cal. Rptr. 3d 657, 670 (Cal. Ct. App. 2012), *as modified on denial of reh'g* (Feb. 27, 2012), *review granted and opinion superseded*, 278 P.3d 1167 (Cal. 2012), *review dismissed*, 356 P.3d 776 (Cal. 2015) (§ 1670.5(a) "authorizes a trial court to refuse to enforce an entire agreement it finds 'permeated' by unconscionability because ... it 'contains more than one unlawful provision.'" (citation omitted)).

Armendariz's arbitration-only anti-severance rule endures notwithstanding this Court's most recent explanation of the broad preemptive force of the FAA. Indeed, it endures even in cases in which the defendant argued that the FAA preempts state-law rules that disfavor arbitration.

For example, in *Samaniego*, 140 Cal. Rptr. 3d at 501, the appellant argued that *Concepcion* preempted each "unconscionability-based rationale that supported the trial court's refusal to compel arbitration." The court of appeals disagreed, quoting *Concepcion* for the proposition that the FAA "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, although not by

defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 502 (quoting 131 S. Ct. at 1746) (internal brackets and quotation marks omitted). In the same breath, however, the Court held that the trial court did not abuse its discretion in refusing to sever the "carve-out" for injunctive and declaratory relief, fee-shifting provisions and shortened limitations period because "[a]n arbitration agreement can be considered permeated by unconscionability if it contains more than one unlawful provision." *Id.* at 501 (citations and internal quotation marks omitted).

Finally, the *Armendariz* rule persists even in cases, such as this one, where the parties agreed to a severability clause expressing their clear intent to have the agreement enforced with any invalid terms excised. *Parada v. Super. Ct.* considered an arbitration agreement that expressly stated: "[i]n the event that any provision of this Agreement shall be determined by a trier of fact of competent jurisdiction to be unenforceable . . . the remainder of this Agreement shall remain binding upon the parties as if such provision was not contained herein." 98 Cal. Rptr. 3d 743, 753 (Cal. Ct. App. 2009). Yet the court completely ignored this unambiguous severance clause, refusing to sever because "a court may refuse to sever a contract provision with multiple unconscionable terms." *Id.* at 769 (quoting *Armendariz*, 6 P.3d at 696-97).

In sum, the *Armendariz* multiple-provisions rule is not a general principle of California contract law; instead, it sets a much lower bar for declining to

enforce arbitration agreements than contracts generally. Moreover, the rule has been applied over the last 15 years *only* to agreements to arbitrate; it has never been applied to evaluate the enforceability of any other type of contract. This is so because *Armendariz* itself assumes that illegal or unconscionable provisions in an arbitration agreement are somehow more egregious than in other contracts and warrant a per se decision to void the agreement.

C. California's multiple-unlawful-provisions rule is rooted in hostility to arbitration.

As discussed, for contracts in general, having two terms deemed unlawful or unconscionable does not displace California's strong presumption in favor of severance, or negate the obligation of a court to carefully examine whether severing the unenforceable terms is feasible and appropriate. The different approach embraced as to arbitration agreements was the result of a deep judicial antagonism to arbitration as an inferior forum for resolving disputes.

The *Armendariz* court went into detail about the basis for its skepticism of arbitration as an inferior forum. The Court highlighted, repeatedly, what it viewed as the "potential disadvantages" and "inherent shortcomings of arbitration." 6 P.3d at 690-91. These included limited discovery, limited judicial review, and limited procedural protections. *Id.* at 690-91. Moreover, the court noted, private arbitration may "become an instrument of injustice," *id.* at 690, not only as to process but as to result. In addition to sacrificing procedural protections, arbitration

generally "reduces the size of the award that an employee is likely to get." *Id.* And "courts and juries are viewed as more likely" than arbitrators "to adhere to the law," and "less likely than arbitrators to 'split the difference' between the two sides." *Id.* at 693.

The court made clear that its negative view of arbitration was going to have real world consequences. Noting that statutory rights "need ... a public, rather than private, mechanism of enforcement," the court declared that it must subject arbitration agreements purporting to cover unwaivable statutory rights to "*particular scrutiny*." *Id.* at 680-81 (emphasis added).

With that preface, the California Supreme Court formulated five minimum, per se "requirements for the lawful arbitration" of statutory rights by employees. First, the arbitration agreement must provide for neutral arbitrators. *Id.* at 682. Second, employees must be allowed "adequate discovery." *Id.* at 683-84. Third, the agreement must guarantee a "written arbitration decision" and "adequate judicial review." *Id.* at 685. Fourth, "all of the types of relief that would otherwise be available in court" must be available to the employee. *Id.* at 682-83. Fifth, the employee may not be required to "bear any type of expense that [he or she] would not be required to bear if he or she were free to bring the action in court." *Id.* at 687-88.

Although couched in terms of unconscionability, these five categorical, per se requirements do not

apply to contracts in general. Instead they apply exclusively to agreements to arbitrate.[2] And this is not the first time that the California Supreme Court has expressed hostility to arbitration. Instead, the California Supreme Court is notorious for imposing conditions on the enforcement of arbitration agreements that do not apply to contracts generally, and that reflect ongoing and repeated hostility towards arbitration.[3]

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[2] Several of these per se rules are likely preempted by the FAA. To take one example, *Armendariz* holds that employees may not be required to "bear any *type* of expense that [he or she] would not be required to bear" in court. *Id.* at 687-88. The court expressly disapproved of requiring a party to prove that she actually was or would be exposed to unaffordable costs, because "it is not only the costs imposed on the claimant[,] but the *risk* that the claimant may have to bear substantial costs that deters the exercise of the" plaintiff's statutory rights. 6 P.3d at 687. That is precisely the opposite of this Court's holding, two months later, in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000). In *Green Tree*, the plaintiff argued that an arbitration agreement that did not specify who would bear arbitration costs was unenforceable because it created a risk that she would have to bear substantial costs, potentially leaving her unable to effectively vindicate her statutory rights. The Court rejected the contention, explaining that a party seeking to avoid enforcement of an arbitration agreement on the basis of costs "bears the burden" of proving "the likelihood of incurring" costs that would actually thwart vindication of her statutory rights. *Id.* at 91-92.

[3] *See, e.g. Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67, 76-79 (Cal. 1999) (prohibiting arbitration of claims for injunctive relief under California's Consumers Legal Remedies Act because of the "evident institutional shortcomings of private arbitration in the field of ... public injunctions" and

Thus, in creating the rule at issue here, the California Supreme Court made clear, repeatedly, that it believes arbitration is an inferior method of adjudicating disputes and warrants a heavy dose of judicial skepticism and scrutiny.

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because "superior court judges are accountable to the public in ways arbitrators are not"); *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1164-65 (Cal. 2003) (extending *Broughton* to prohibit arbitration of claims for injunctive relief under California's unfair competition and misleading advertising laws because those actions are "undertaken for the public benefit" and there is thus an "inherent conflict" with arbitration); *Ferrer v. Preston*, 51 Cal. Rptr. 3d 628, 631, 634 (Cal. Ct. App. 2007) (refusing to enforce arbitration agreement because California's Talent Agencies Act "vests exclusive original jurisdiction in the [Labor] Commissioner to resolve issues arising under the Act"), *rev'd*, 552 U.S. 346 (2008); *Sonic-Calabasas A, Inc. v. Moreno*, 247 P.3d 130, 139-146 (Cal. 2011) (invalidating, as contrary to public policy and unconscionable, a provision in an arbitration agreement that waived a "*Berman* hearing" before the California Labor Commissioner for an unpaid wage claim, because the *Berman* hearing "provides on the whole substantially lower costs and risks to the employee, greater deterrence of frivolous employer claims, and greater assurance that awards will be collected, than does the binding arbitration process alone" and "the benefits the employee gains from arbitration" do not compensate "for what he or she loses by forgoing the option of a *Berman* hearing"), *vacated*, 132 S. Ct. 496 (2011) (mem.).

III. California's Multiple-Unlawful-Provisions Rule, Uniquely Applied To Arbitration Agreements, Is Preempted By The FAA.

As discussed, for 15 years the California courts have applied the *Armendariz* multiple-provisions rule to hold agreements to arbitrate invalid on grounds that do not apply to contracts generally. For contracts generally, California law expresses an overwhelming preference for contract enforcement, and California courts will generally sever any illegal or unconscionable provisions that can be feasibly severed. *Supra*, § II.A. But for arbitration contracts, California courts apply a different analysis, one that expressly applies only to agreements to arbitrate and favors invalidating such agreements, rather than severing out any objectionable provisions. *Supra*, § II.B. As detailed above, that arbitration-only anti-severance rule is rooted in an antagonistic view of arbitration as an inferior forum for dispute resolution, and arbitration agreements as requiring particular scrutiny. *Supra*, § II.C.

Under the *Armendariz* multiple-unlawful-provisions rule, the mere presence of more than one unconscionable provision allows a Court to throw out the entire arbitration agreement because where an "arbitration agreement contains more than one unlawful provision," that in and of itself "indicate[s] a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage" and allows a court to conclude that the "arbitration agreement is permeated by an unlawful

purpose." *Armendariz*, 6 P.3d at 696-97. No similar rule applies to contracts generally. There is no rule that more than one unconscionable provision in any other type of contract indicates a systematic effort to take advantage of the weaker party, and therefore automatically allows a court to throw out the entire contract as permeated by an unlawful purpose.

The multiple-unlawful-provisions rule—which applies only to arbitration agreements—is therefore preempted by the FAA. The rule treats agreements to arbitrate "in a manner different from that in which it otherwise [treats] nonarbitration agreements under state law." *Perry*, 482 U.S. at 492 n.9. It "singl[es] out arbitration provisions for suspect status." *Doctor's Assocs.*, 517 U.S. at 687 It "takes its meaning precisely from the fact that a contract to arbitrate is at issue" by expressly stating that multiple unlawful provisions in an agreement to arbitrate, but not any other contract, indicate an unlawful purpose. And it "rel[ies] on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable[,]" because in no other contract setting do two or more unconscionable provisions automatically allow a court to throw out the entire agreement. *Concepcion*, 131 S. Ct. at 1746-47 (quoting *Perry*, 482 U.S. at 493 n.9). For all the reasons set forth above, it cannot be sustained under the FAA or this Court's precedents, and the court of appeals and district court's rulings here premised on the *Armendariz* rule must be reversed.

As Judge Gould explained, "the district court's decision not to sever the unconscionable provisions of

the arbitration agreement relying on *Armendariz* is ... based on an erroneous interpretation and an inaccurate view of *Concepcion* and the FAA." Pet. App. 11a. Specifically, "[t]he reasoning in *Armendariz* that multiple unconscionable provisions will render an arbitration agreement's purpose unlawful," so as to presumptively justify refusal to sever, "should have been preempted by the [FAA]." Pet. App. 8a.

This is especially clear for a contract with an express severability clause. The FAA embodies an overarching federal policy "to ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010) (citation and internal quotation marks omitted). The Agreement in this case contains an express severability clause. Pet. App. 53a-54a ("[I]f any provision of this Agreement is rendered invalid or unenforceable ... the remaining provisions of this Agreement shall remain in full force and effect."). Yet the district court and Ninth Circuit ignored the clause altogether. California courts do the same. As we detailed above (at 38), even in cases with express severability clauses, California courts apply *Armendariz's* multiple-defects rule and refuse to sever unconscionable provisions. *See, e.g., Parada v. Super. Ct.*, 98 Cal. Rptr. 3d at 753 (ignoring an unambiguous severability clause, applying *Armendariz's* multiple-provisions rule, and refusing to sever). Nothing could be further from enforcing arbitration agreements "according to their terms." *Stolt-Nielsen*, 130 S. Ct. at 1773.

Absent the *Armendariz* arbitration-only anti-severance rule, the district court here would have

examined whether severance was feasible and whether the agreement was truly permeated by unconscionability. The district court, relying on *Armendariz*, did not undertake that analysis. Instead, it simply listed the unconscionable provisions, cited *Armendariz*, and concluded that it "could not attempt to ameliorate the unconscionable aspects of the Agreement without being required to assume the role of contract author rather than interpreter." Pet. App. 30a (internal quotation marks omitted). That is false. The American Arbitration Association rules agreed to by the parties, Pet. App. 56a, would fill any gaps that would result from voiding the terms identified by the district court, such as the arbitrator selection procedure. The district court would therefore not be required to cure any omission or "assume the role of contract author," Pet. App. 30a. Indeed, Judge Gould illustrated how easy it would be to excise the challenged provisions and still have a fully viable arbitration agreement—one that preserved the parties' original intent to arbitrate, rather than litigate, their disputes. Pet. App. 8a-10a.

Accordingly, this Court should hold the *Armendariz* rule preempted and direct the district court to sever any unconscionable terms and compel arbitration. In the alternative, the Court may wish to remand to the district court for it to engage in the detailed fact specific, case-by-case severability analysis applied in all other severability contexts, without any special rules or hostility to arbitration.

CONCLUSION

For the reasons set forth above, this Court should hold that California's multiple-unlawful-provisions rule is preempted by the FAA. It should accordingly reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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Supreme Court of the United States

MHN GOVERNMENT SERVICES, INC., AND
MANAGED HEALTH NETWORK, INC.,
Petitioners,

v.

THOMAS ZABOROWSKI, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* ATLANTIC LEGAL FOUNDATION AND THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONERS

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December 2, 2015

QUESTION PRESENTED

Whether Federal law preempts California's severability rule applicable only to agreements to arbitrate, even when the agreement contains an express severability clause, and when California law applies a different rule of contract severability to other types of contracts.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amici curiae* Atlantic Legal Foundation and International Association of Defense Counsel state the following:

Atlantic Legal Foundation is a not for profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no shareholders, parents, subsidiaries or affiliates.

The International Association of Defense Counsel is a non-profit professional association. It has no parent company and no shareholders.

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INTEREST OF *AMICI CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists. Atlantic Legal's directors and advisors are familiar with the role arbitration clauses play in the contracts entered into between companies and between companies and consumers. Some of Atlantic Legal's directors and advisers have decades of experience with arbitration – as legal counsel, as arbitrators, and as members or

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. The consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

supporters of organizations that administer arbitration regimes. They are familiar with the benefits of arbitration, especially the role of arbitration (and other "alternative dispute resolution" mechanisms) in facilitating business and commerce and in alleviating the burdens on courts and parties.

The International Association of Defense Counsel ("IADC"), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of class actions as well as arbitrations, both of which are increasingly global in reach.

The abiding interest of *amici* in the benefits of arbitration is exemplified by their participation as *amicus* and as counsel for *amici* in several cases concerning Federal arbitration law, including, *inter*

alia, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) and, recently, *DIRECTV, Inc. v. Imburgia*, No. 14-462, currently before the Court.

Amici believe that the decisions of the Court of Appeals for the Ninth Circuit and the district court in this case are inconsistent with the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* ("FAA") and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) in which this Court held that the FAA means exactly what it says: Agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."(*Id.* at 1745, quoting 9 U.S.C. § 2). The FAA preempts state laws that expressly disfavor arbitration agreements. The FAA also preempts "generally applicable contract defenses," which purport to apply to all contracts, but which in practice apply "only to arbitration" or that "derive their meaning from the fact that an agreement to arbitrate is at issue," *(id.* at 1746) or which "have a disproportionate impact on arbitration agreements." (*Id.* at 1747).

PRELIMINARY STATEMENT

In this case the parties agreed to arbitrate their disputes, and they agreed that if any particular terms of the agreement were deemed by a court to be invalid or unenforceable, the court should sever those terms and enforce the remainder of the agreement.

Petitioners are military contractors who contract with the Department of Defense to provide military service members and their families with confidential life-skills counseling. Consultants who work for petitioners, including respondents Zaborowski and Baldini, are independent, highly-trained, and well-educated professionals who hold graduate degrees and professional licenses that require advanced training. Pet. 4-5.

Respondents signed a contract, the Provider Services Task Order Agreement (hereafter the "Agreement"), which contains a section captioned "**Mandatory Arbitration**" in bold and underlined typeface written in the same type font and type size as the rest of the contract. The arbitration provision requires that the parties confer in good faith to resolve any problems or disputes that may arise under the Agreement as a condition precedent to any arbitration demand by either party, and that any controversy or claim arising out of or relating to the Agreement, or breach

thereof, shall be settled by final and binding American Arbitration Association arbitration in San Francisco, California before a single, neutral arbitrator who is licensed to practice law to be chosen by the consultant (called the "Provider") from a list of three neutral arbitrators provided by MHN. The Mandatory Arbitration clause further states that the parties waive their right to a jury or court trial. The Arbitration clause also stipulates that the decision of the arbitrator shall be final and binding, and that the arbitrator shall have no authority to make material errors of law, to award punitive damages, to add to, modify or refuse to enforce any agreements between the parties, or to make any award that could not have been made by a court of law. The Arbitration clause also provides that the prevailing party, or substantially prevailing party's costs of arbitration, are to be borne by the other party, including reasonable attorney's fees. Pet. 5-7; Pet. App. 56a-57a.

The Agreement also contains an express severability clause, captioned "**Severability**", which, like the arbitration clause, is in the same typeface and type size as the rest of the Agreement and provides that if "any provision of this Agreement is rendered invalid or unenforceable . . . the remaining provisions of this Agreement shall remain in full force and effect." Pet. 7, Pet. App. 5a.

Respondents filed a putative class-action lawsuit in district court against Petitioners, alleging violations of the Fair Labor Standards Act. Pet. 7. Petitioners moved to compel arbitration, which Respondents opposed. The district court, applying California law, concluded that multiple terms in the arbitration agreement were unconscionable. Pet. 8, Pet. App. 17a-28a. The district court refused to sever the purportedly unconscionable provisions of the arbitration clause. The district court noted that, under California law, a court may decline a request to sever a contract when the contract "is permeated by unconscionability" Pet. App. 29a (internal quotation marks omitted). The court invalidated the entire arbitration agreement, holding that "[t]he finding of 'multiple unlawful provisions' allows a trial court to conclude that 'the arbitration agreement is permeated by an unlawful purpose'" and to deny severance. *Id.* (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 697 (Cal. 2000)).

A divided panel of the Ninth Circuit affirmed. The majority of the panel agreed with the district court that multiple provisions of the arbitration agreement were unconscionable. Pet. 8, Pet. App. at 2a-4a.

First, the panel held, the arbitrator-selection clause is substantively unconscionable because it

gives MHN the "power to control arbitrator candidates" citing *Chavarria v. Ralph's Grocery Co.*, 733 F.3d 916, 923-26 (9th Cir. 2013) Pet. App. 3a. But, as the panel itself acknowledged, the Agreement requires that those arbitrators be "neutral." *Second*, the panel held that the Agreement's six month limitations period is substantively unconscionable because, given the nature of plaintiffs' claims, the limitations period works as a "practical abrogation of the right of action," citing *Ellis v. U.S. Sec. Assocs.*, 169 Cal.Rptr.3d 752, 757 (Cal. Ct. App. 2014). Pet. App. 3a.

Third, the costs-and-fee-shifting clause, which awards fees and costs to the "prevailing party, or substantially prevailing party[]," is, in the panel's view, "substantively unconscionable" because it results in an "unreasonable" and "unexpected" allocation of risks, citing *Samaniego v. Empire Today LLC*, 140 Cal.Rptr.3d 492, 497 (Cal. Ct. App. 2012) because even if plaintiffs prevail on some of their claims but not all, they may still be required to pay MHN's attorney's fees and costs; this provision, the panel wrote, is contrary to the applicable statutory cost-shifting regimes provided by California and federal law, which entitle only the prevailing plaintiff to an award of costs and fees. The effect of this fee-award clause, the Panel said, deters employees from seeking vindication of

their rights by pursuing arbitration. Pet. App. 4a. However, California Code of Civil Procedure § 1021 provides that "[e]xcept as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties." Moreover, California Civil Code § 1717 (b)(1) provides that "the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract," a concept quite similar to the Agreement's "substantially prevailing party" language. *Finally*, the panel held, the "filing fees and punitive damages waiver" provisions are "substantively unconscionable" because the American Arbitration Association's filing fee hampers the employee more than it does MHN, and the punitive damages waiver "improperly proscribes available statutory remedies" afforded to plaintiffs bringing employment claims. Pet. App. 4a, citing *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1179 (9th Cir. 2003). The filing fee and punitive damages waiver provisions are facially neutral. The specifics of the filing fee provision are, of course, unique to arbitration, and to that extent

the panel's decision does not rest on a defense "generally applicable" to all contracts.[2]

The Circuit Court panel also upheld the district court's denial of severance. The panel majority relied on *Samaniego,* 140 Cal.Rptr.3d at 501 which held: "An arbitration agreement can be considered permeated by unconscionability if it 'contains more than one unlawful provision . . . Such multiple defects indicate a systematic effort to impose arbitration . . . not simply as an alternative to litigation, but as an inferior forum that works to the [stronger party's] advantage.'" Pet. 8-9; Pet. App. 5a.

The panel majority rejected MHN's preemption arguments as "foreclosed by" Ninth Circuit precedent, and held that the severability analysis was not "impermissibly unfavorable to arbitration." Pet. App. 5a-6a (citing *Chavarria*, 733 F.3d at 926-27.

Circuit Judge Gould dissented. Judge Gould wrote that *Armendariz* was decided more than a decade before the Supreme Court's decision in

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[2] In some respects, arbitration is more accessible to individual plaintiffs than court litigation; for example, arbitration procedures usually limit discovery, which is frequently prolonged and expensive. Indeed, the Agreement at issue circumscribes discovery. *See* Agreement, § 20, Pet. App. 56a.

Concepcion and that "[t]he reasoning in *Armendariz* that multiple unconscionable provisions will render an arbitration agreement's purpose unlawful has a disproportionate impact on arbitration agreements' and should have been preempted." Pet. App. 8a (quoting *Concepcion*, 131 S. Ct. at 1747). Judge Gould further observed that "*Concepcion* and its progeny should create a presumption in favor of severance when an arbitration agreement contains a relatively small number of unconscionable provisions that can be meaningfully severed and after severing the unconscionable provisions, the arbitration agreement can still be enforced." *Id.*

Remarkably, the Ninth Circuit panel majority seemed to ignore entirely this Court's holding in *Concepcion*, which it cited not once.

The Ninth Circuit denied further review. Pet. 10, Pet. App. 31a.

SUMMARY OF ARGUMENT

California courts routinely display the very hostility to arbitration that the FAA was designed to end. Indeed, this case, and other cases, such as *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) and *DIRECTV v. Imburgia*, No. 14-462, presently before the Court, demonstrate that California law, whether construed by state courts or by federal courts sitting in California, is

frequently in conflict with the language and purpose of the FAA and this Court's FAA jurisprudence.

In construing and enforcing contracts generally, California courts honor severability provisions, and do not invalidate the entire agreement unless doing so would be impossible without rewriting the agreement or unless the core purpose of the agreement is illegal. In construing agreements to arbitrate, however, California courts hold that the existence of more than one invalid provision can be interpreted by a court to indicate that the "stronger party" sought to use arbitration as a tool to take advantage of the "weaker party," not as legitimate alternative to litigation. California courts thus can refuse to sever the "offending" contract clauses and, instead, invalidate the entire arbitration agreement. This, we submit, shows a clear bias against arbitration.

The Ninth Circuit's decision upholding California's unconscionability/non-severability rule is contrary to binding precedent of this Court construing the FAA as favoring arbitration and precluding state law that is inimical to arbitration.

ARGUMENT

THE DECISIONS BELOW ARE INCONSISTENT WITH THE FEDERAL ARBITRATION ACT AND THIS COURT'S TEACHING ON THE ENFORCEABILITY OF ARBITRATION AGREEMENTS

Amici urge this Court to reverse the Court of Appeal's decision and reaffirm this Court's holdings in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), and numerous other cases, which recognize the overriding Congressional policy favoring arbitration.

This Court has repeatedly held that the "fundamental principle [is] that arbitration is a matter of contract," *Concepcion*, 131 S. Ct. at 1745 (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)); *see also Stolt-Nielsen*, 559 U.S. at 681; *Volt Information Scis., Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989), and that courts must enforce arbitration agreements according to their terms, *Volt*, 489 U.S. at 478; *Stolt-Nielsen*, 559 U.S. at 682; *Concepcion*, 131 S. Ct. at 1748.

The FAA, and FAA section 2 in particular, was intended to 'revers[e] centuries of judicial hostility to arbitration agreements,' by 'placing arbitration

agreements upon the same footing as other contracts.'" *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-226 (1987) (citing *Scherk v. Alberto-Culver Co.*, 417 U. S. 506, 510-11 (1974).

The FAA reflects "a 'liberal federal policy favoring arbitration.'" *Concepcion*, 131 S. Ct. at 1745 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)."[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone*, 460 U.S. at 24-25 & n.32; *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626 (1985). California courts often ignore these precepts.

State courts may refuse to enforce arbitration agreements only "upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2. But even state laws purporting to apply to all contracts are preempted by the FAA if they "have a disproportionate impact on arbitration agreements." *Concepcion*, 131 S. Ct. at 1747. Thus, preemption applies when a "generally applicable contract defense" in practice applies "only to arbitration" or "derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1746; *see also, e.g., Marmet Health*

Care Ctr., Inc. v. Brown, 565 U.S. ___, 132 S. Ct. 1201, 1203-04 (2012); *Rent-A-Center*, 561 U.S. at 67-68; *Preston v. Ferrer*, 552 U.S. 346, 356 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443-44 (2006); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88 & n.3 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995); *Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987)[3]; *Southland Corp. v. Keating*, 465 U.S. 1, 16 & n.11 (1984).

The California law at issue here – which encourages courts to void arbitration agreements that contain clauses that are deemed "unconscionable," rather than to sever the offending provisions and preserve the essence of the agreement to arbitrate – is preempted by federal law. The state court decisions on which the courts below rely evince a strong aversion to parties' rights to contract for arbitration and the continued "judicial hostility towards arbitration" that the FAA was intended to foreclose. *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503

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[3] In *Perry*, the Court said that the FAA's preemptive effect might extend even to grounds traditionally thought to exist "'at law or in equity for the revocation of any contract.'" *Id.*, at 492, n. 9 (emphasis deleted), and that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable. . ." *Id.*, at 493, n. 9.

(2012) (*per curiam*), quoting *Concepcion*, 131 S. Ct. at 1745, 1747, 1757; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

California courts generally enforce valid portions of a contract that has some unenforceable provisions: "It is settled that where a contract has both void and valid provisions, a court may sever the void provision and enforce the remainder of the contract." *Adair v. Stockton Unified School Dist.*, 77 Cal.Rptr.3d 62 (Cal. Ct. App. 2008) (employment contract), citing California Civil Code § 1599. This has been the rule for a century, and remains so today. *See Hedges v. Frink*,163 P 884, 885 (Cal. 1917); *Symcox v. Zuk*,34 Cal.Rptr. 462, 466 (Cal. Dist. Ct. App. 1963); *In re Marriage of Facter*, 152 Cal.Rptr.3d 79, 95 (Cal. Ct. App. 2013); *see also* 1 Witkin, Summary of Cal. Law Contracts, § 422, at 463-464 (10th ed. 2005) and cases cited therein.

A court will commonly determine severance is appropriate unless "the central purpose of the contract is tainted with illegality." *Marathon Entertainment, Inc. v. Blasi*, 174 P.3d 741, 754 (Cal. 2008). If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. On the other hand, if the illegality is collateral to the main purpose of the contract, and the illegal provision can be excised

from the contract by means of severance or restriction, then such severance and restriction are appropriate. *See Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 985-86 (Cal. 2003). Only "[i]f the court is unable to distinguish between the lawful and unlawful parts of the agreement" may the court invalidate the entire contract. *Birbower, Montalbano, Condon & Frank v. Super. Ct.*, 949 P.2d 1, 12 (Cal. 1998).[4] In *Birbrower*, the California Supreme Court was dealing with attorney's fees – both fixed fee and contingency fee arrangements – and held that nothing in the nature of the agreement was an obstacle to severance. It directed the trial court to determine, on remand, whether a partially valid agreement existed, and, if so, what value should be attributed to legally provided services. *Birbrower*, 949 P.2d at 12-13. The central purpose of the Agreement in this case, and of the arbitration provision of it, cannot be said to be tainted with illegality.

Under California law, almost any arbitration agreement between an employer and a non-union employee would be deemed unconscionable and unenforceable because of the "unequal" bargaining

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[4] Judge Gould, in his dissent below, showed that one can readily distinguish between the lawful and allegedly unlawful parts of the Agreement, excise the unlawful parts, and still preserve the essence of the agreement to arbitrate. Pet. App. 8a-10a.

power of the parties.[5] *See Martinez v. Master Prot. Corp.*, 118 Cal.App.4th 107, 114, 12 Cal.Rptr.3d 663 (2004) ("An arbitration agreement that is an essential part of a 'take it or leave it' employment condition, without more, is procedurally unconscionable)," cited in *Nagrampa v. Mailcoups, Inc.*,469 F.3d 1257 (9th Cir. 2006) (arbitration clause in franchise agreement unenforceable because of unequal bargaining power of franchiser and franchisee). However, the relative bargaining power of the parties, which is the rationale for disfavoring arbitration provisions in employment or consumer contracts, is not always decisive. California routinely enforces limited warranties and other terms found in other types of form contracts. *See, e.g., Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.*, 107 Cal.Rptr.2d 645 (Cal. Ct. App. 2001) (indemnification); *Olsen v. Breeze, Inc.*, 55 Cal.Rptr.2d 818 (Cal. Ct. App. 1996) (release); *Allan v. Snow Summit, Inc.*, 59 Cal.Rptr.2d 813 (Cal. Ct. App. 1996)(promise to accept risk of injury and to hold ski resort harmless).

But California courts treat arbitration agreements differently, and impose on form arbitration clauses more or different requirements

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[5] Sometimes called "contracts of adhesion."

from those imposed on other contract clauses.[6] One of the cases on which the Ninth Circuit panel relied extensively, *Armendariz*, creates special requirements and establishes special hurdles for arbitration agreements. It applies a bright-line rule disfavoring severability and favoring nullification in the context of arbitration agreements when there is none in the context of ordinary contracts, and thus the FAA would preempt this decision for its bias against agreements to arbitrate. Because *Armendariz* treats arbitration clauses more unfavorably than other types of contracts, under *Concepcion* it is preempted.

California courts treat arbitration agreements quite differently and exhibit the very suspicion of and hostility towards arbitration this Court has

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[6] Unlike many such contracts, the arbitration and severability provisions of the contracts between MHN and respondents were in the same type size as all other parts of the document and the title of the section was set out in bold type. There was no attempt to hide or minimize those provisions. Moreover, respondents and other consultants are highly-educated professionals, well able to understand the agreement they signed. In *Samaniego,* the plaintiffs were low-level manual laborers, not proficient in English, *see* 140 Cal.Rptr.3d at 498; *see also Higgins v. Superior Court*, 45 Cal. Rptr.3d 293 (Cal. Ct. App. 2006) (the parties to an agreement to appear in reality television program were young and unsophisticated).

denounced. *Samaniego*, for example, holds that when an "arbitration agreement contains more than one unlawful provision," that fact by itself "indicate[s] a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." *Samaniego*, 140 Cal.Rptr.3d at 501 (Cal. Ct. App. 2012), cited by the Ninth Circuit panel, Pet. App. 5a. *See also Broughton v. Cigna*, 988 P.2d 67, 78 (Cal. 1999) ("The judicial forum has significant institutional advantages over arbitration in administering a public injunctive remedy, which as a consequence will likely lead to the diminution or frustration of the public benefit if the remedy is entrusted to arbitrators."); *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157, 1163 (Cal. 2003) ("Arbitration cannot necessarily afford all the advantages of adjudication in the area of private attorney general actions, that in a narrow class of such actions arbitration is inappropriate, and that this inappropriateness does not turn on the happenstance of whether the rights and remedies being adjudicated are of state or federal derivation," and that this Court's decisions in *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) do not weaken the California court's holding in *Broughton*.)

It is noteworthy that while some California cases seem to acknowledge that *Armendariz* has been "abrogated in relevant part on other grounds" by *Concepcion*, the Ninth Circuit panel did not. For example, recently the California Supreme Court in *Sanchez v. Valencia Holding Co. LLC*, (2015) Cal. LEXIS 5292) applied *Concepcion* to strike down provisions of the California Consumer Legal Remedies Act (CLRA) (Cal. Civil Code Sections 1751 and 1781) which provide for class action litigation and which declare the right to a class action to be unwaivable as preempted by the FAA. The court specifically noted *Concepcion*'s holding, "that a state rule invalidating class waivers interferes with arbitration's fundamental attributes of speed and efficiency, and thus disfavors arbitration as a practical matter." *See also, e.g.*, *Herskowitz v. Apple Inc.*, 940 F. Supp. 2d 1131, 1144 (N.D. Cal. 2013), *Oguejiofor v. Nissan*, 2011 WL 3879482 at *8 (N.D.Cal. 2011), *Baeza v. Superior Court*, 135 Cal.Rptr.3d 557 (Cal. Ct. App. 2011), *Lona v. Citibank, N.A.*, 134 Cal. Rptr.3d 622, 637 (2011), *GAR Energy & Associates, Inc. v. Ivanhoe Energy Inc.*, No. 1:11-CV-00907 AWI, 2011 WL 6780927, at *8 (E.D. Cal. Dec. 27, 2011), *report and recommendation adopted*, 2012 WL 174952 (E.D. Cal. Jan. 20, 2012). Indeed, as noted above, the panel's decision in this case does not even cite *Concepcion*.

This Court has repeatedly rejected such "generalized attacks on arbitration that rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law." *See, e.g., Green Tree Fin. Corp.-Ala.*, 531 U.S. at 89-90 (quotation omitted); *Circuit City Stores, Inc.* (mandatory arbitration agreements in the employment context fall under the FAA).

As Judge Easterbrook noted in *Oblix, Inc., v. Winiecki*, 374 F.3d 488 (7th Cir. 2004) , arbitration clauses usually are supported by consideration – in this case the consultant's compensation. Contracts typically contain "bundles of rights and obligations" of both parties. An arbitration clause is no more suspect, or any less enforceable, than the other provisions. Arbitration was as much a part of the meeting of the minds between MHN and the consultants as were the consultant's pay and benefits, confidentiality undertakings, and other terms.

Severance of provisions found to be illegal or unenforceable would give effect to the intent of the contracting parties, which was the "preeminent concern" of Congress in passing the FAA – "to enforce private agreements into which parties had entered." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *see also Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. at 479 (1989) ("the FAA's primary purpose"

was to "ensur[e] that private agreements to arbitrate are enforced according to their terms").

Under the California standard, as applied by the lower courts in this case, the mere existence of multiple "unlawful provisions" allows a trial court to conclude that "the arbitration agreement is permeated by an unlawful purpose" and to deny severance. *See Armendariz*, 6 P.3d at 697); *see also Carmona v. Lincoln Millennium Car Wash, Inc.*, 171 Cal.Rptr.3d 42, 55 (Cal. Ct. App. 2014). *Armendariz* sets categorical requirements specific to arbitration clauses.[7] California's "two strikes

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[7] *Armendariz* sets forth four "minimum requirements for the arbitration of nonwaivable statutory claims," including claims of discrimination in employment asserted under the FEHA. *Armendariz*, 6 P.3d at 757-758, 766. First, the arbitration agreement "may not limit statutorily imposed remedies such as punitive damages and attorney fees." (*Id.* at 759.) Second, "adequate discovery is indispensable for the vindication of FEHA claims," and employees "are at least entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses...." (*Id.* at 760, 761.) Third, "in order for judicial review to be successfully accomplished, an arbitrator in a FEHA case must issue a written arbitration decision that will reveal, however, briefly, the essential findings and conclusions on which the award is based." (*Id.* at 762.) Fourth, "when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee

(continued...)

and you're out" rule as to arbitration agreements (*see Samaniego*, 140 Cal.Rptr.3d at 501 ("'An arbitration agreement can be considered permeated by unconscionability if it contains more than one unlawful provision . . . .'" (emphasis added)); *see also Lhotka v. Geographic Expeditions, Inc.*, 104 Cal.Rptr.3d 844, 853 (Cal. Ct. App. 2010); *Parada v. Super. Ct.*, 98 Cal.Rptr.3d 743, 769 (Cal. Ct. App. 2009), is clearly inimical to the principle that state law cannot disfavor arbitration.

In *Armendariz*, the California state court decision on which the Ninth Circuit grounded its decision here, the court refused to apply the FAA. Instead, it held that arbitration agreements should be reviewed with "a particular scrutiny." 6 P.3d at 757. It described arbitration as a potential

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[7](...continued)
would not be required to bear if he or she were free to bring the action in court." (*Id.* at 765, italics omitted.) The court in *Armendariz* further held that employer agreements purporting to require arbitration of nonwaivable statutory claims meeting these four "minimum requirements" must additionally be scrutinized under the principles of unconscionability "that apply more generally to any type of arbitration imposed on the employee by the employer as a condition of employment, regardless of the type of claim being arbitrated." (*Id.* at 766.) The California Supreme Court reiterated these principles of unconscionability applicable to arbitration agreements in *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, 282 P.3d 1217 (Cal. 2012).

"instrument for injustice," *id.* at 768, and an "inferior forum," *id.* at 775, rife with "disadvantages that may exist for plaintiffs arbitrating disputes," *id.* at 770. Among these were "the fact that courts and juries are viewed as more likely to adhere to the law and less likely than arbitrators to 'split the difference' between the two sides, thereby lowering damages awards for plaintiffs." *Id.*

Armendariz openly displays the kind of hostility to arbitration that this Court has repeatedly criticized. In short, the rules derived from *Armendariz* – including the severance rule – do not treat arbitration agreements equally with ordinary contracts, as the FAA requires. *See, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 266 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 231-32 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

As Circuit Judge Gould showed in his dissent, severance of the "offending" clauses would have given effect to the intent of the contracting parties and ensured that the essence of their agreement to arbitrate would be enforced. Applying a different rule to arbitration that treats arbitration agreements less favorably than other contractual

promises, as California does, and the Ninth Circuit did in this case, violates the FAA.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

MHN GOVERNMENT SERVICES, INC., AND MANAGED HEALTH NETWORK, INC.,

Petitioners,

v.

THOMAS ZABOROWSKI, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.[1]

To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including cases involving the enforceability of arbitration agreements. See, *e.g.*, *DIRECTV, Inc.* v. *Imburgia*, No. 14-462 (U.S. argued Oct. 6, 2015); *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC* v. *Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011).

Arbitration agreements allow the parties to replace expensive, time-consuming, and contentious in-court litigation with speedy, inexpensive, fair, and often far less adversarial dispute-resolution proce-

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[1] The Chamber affirms that no counsel for a party authored this brief in whole or in part and that no person other than the Chamber, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties' consents to the filing of *amicus* briefs are on file with the Clerk's office.

dures. For these reasons, many of the Chamber's members and affiliates routinely employ arbitration agreements as a key element in millions of their contractual relationships. As Congress intended when it enacted the Federal Arbitration Act, 9 U.S.C. §§ 1-16, the result has been not only conservation of judicial resources but also substantial litigation cost savings for the parties, which in turn have allowed for lower prices for consumers, higher wages for employees, and benefits for the national economy as a whole.

The many benefits of arbitration agreements—secured by the FAA's prohibition against discriminatory treatment of arbitration contracts—are threatened when courts impose or enforce state-law rules that do not apply uniformly to all contracts or are inconsistent with the strong federal presumption in favor of arbitration. Although this Court has consistently condemned such hostility to arbitration, some courts have persisted in their efforts to circumvent federal law. Accordingly, the Chamber has a strong interest in ensuring that decisions like the one here that are starkly inconsistent with this Court's FAA precedents are not allowed to stand.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has observed that "the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas.'" *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 342 (2011). Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration

agreements." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal quotation marks omitted).

The special severability rule set forth in *Armendariz* v. *Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000)—on which the court of appeals relied in this case—is a discriminatory legal rule prohibited by the FAA. *Armendariz* holds that whenever an "arbitration agreement contains more than one unlawful provision," a trial court may strike down the agreement in its entirety rather than severing the unlawful clauses. *Id.* at 696-97. California courts have repeatedly applied this mechanical rule to invalidate arbitration agreements.

The *Armendariz* rule stands in stark contrast to California's approach to severability outside the arbitration context. When faced with contracts that do not involve arbitration, California courts stress the importance of case-by-case evaluation and apply a liberal policy in favor of severability. *Armendariz* thus, in purpose and effect, treats arbitration agreements less favorably than other contract terms—the precise discriminatory treatment forbidden by the FAA.

The Ninth Circuit in this case applied *Armendariz*'s severability rule to invalidate an arbitration agreement solely on the ground that it contained multiple provisions found to be invalid. This Court should reverse the holding below, reaffirm that the FAA prohibits state law from singling out arbitration agreements for disfavored treatment, and require the court below to apply to the arbitration contract at issue here California's generally applicable pro-severability principles.

ARGUMENT

California's *Armendariz* Rule Discriminates Against Arbitration Agreements In Violation Of The FAA.

The FAA "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate * * * is revocable 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987) (emphasis added) (quoting 9 U.S.C. § 2; emphasis added by the Court). While courts may refuse to enforce arbitration agreements based upon rules of contract law that apply to all contracts, they may not apply contract-law doctrines in a manner that discriminates against arbitration clauses.

The court below violated this fundamental precept by applying a virtually automatic rule—the *Armendariz* severability rule—that allows a court to strike down an entire arbitration agreement on the basis of two invalid provisions without undertaking the severability analysis that applies to non-arbitration contracts. The *Armendariz* rule was born out of an arbitration agreement, has been applied only to arbitration agreements, and is overwhelmingly likely to affect only arbitration agreements. In short, it singles out arbitration agreements for less favorable treatment than other contracts.

This severability rule is just one of a broad set of arbitration-only rules announced by the California Supreme Court in *Armendariz* that are each preempted by the FAA. The continuing application of *Armendariz* in federal and state courts in California amplifies California's traditional, and continuing, hostility towards arbitration. This Court should

(once again) reject California's discriminatory treatment of arbitration contracts and reaffirm that the FAA requires States to determine the meaning and enforceability of arbitration agreements by applying generally applicable contract law principles, and prohibits rules holding arbitration agreements to different, more restrictive standards.

A. The FAA Requires States To Put Arbitration On At Least Equal Footing With Other Contract Provisions.

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *Waffle House*, 534 U.S. at 289 (internal quotation marks omitted); see also, *e.g.*, *Preston* v. *Ferrer*, 552 U.S. 346, 353 (2008) ("Section 2 'declare[s] a national policy favoring arbitration' of claims that parties contract to settle in that manner.") (quoting *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984)); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995) (FAA "seeks broadly to overcome judicial hostility to arbitration agreements").

The heart of the FAA is Section 2, which "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate * * * is revocable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Perry*, 482 U.S. at 489 (quoting 9 U.S.C. § 2). "By enacting § 2, * * * Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Doctor's Assocs.* v. *Casarotto*, 517 U.S. 681, 687 (1996) (quoting *Scherk* v. *Alberto-*

Culver Co., 417 U.S. 506, 511 (1974)). State-law rules that discriminate against arbitration are flatly forbidden.[2]

A state-law rule discriminates against arbitration not only when it "prohibits outright the arbitration of a particular claim," but also when it is "applied in a fashion that disfavors arbitration" or has a "disproportionate impact on arbitration." *Concepcion*, 563 U.S. at 341-42. Put another way, the FAA permits States to apply state-law principles of contract interpretation and enforcement to an arbitration agreement as long as those rules "govern * * * the validity, revocability, and enforceability of contracts *generally*." *Perry*, 482 U.S. at 492 n.9 (emphasis added). "A court may not * * * construe [an arbitration] agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." *Ibid.*; see also, *e.g.*, *Doctor's Assocs.*, 517 U.S. at 686-88; *Allied-Bruce*, 513 U.S. at 281.

In sum, Section 2's "substantive command" is that state and federal courts must "treat[]" arbitration agreements "like all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006); see also, *e.g.*, *Marmet Heath Care Ctr., Inc.* v. *Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam)

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[2] See, *e.g.*, *Marmet Heath Care Ctr., Inc.* v. *Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam); *Concepcion*, 131 S. Ct. at 1745; *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 67-68 (2010); *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 630 (2009); *Preston*, 552 U.S. at 356; *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006); *Allied-Bruce*, 513 U.S. at 270-271; *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989); *Perry*, 482 U.S. at 492 n.9; *Southland*, 465 U.S. at 10-11 & 16 n.11.

(summary reversal); *KPMG LLP* v. *Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (summary reversal).

B. California Treats Arbitration Agreements Less Favorably Than Other Contracts When Deciding Whether To Sever Invalid Provisions.

California law generally "take[s] a very liberal view of severability, enforcing valid parts of an apparently indivisible contract where the interests of justice or the policy of the law would be furthered." *In re Marriage of Facter*, 212 Cal. App. 4th 967, 987 (2013) (quoting *Adair* v. *Stockton Unified Sch. Dist.*, 162 Cal. App. 4th 1436, 1450 (2008)). This view is codified in two sections of the California Civil Code.

First, Section 1599 provides that "[w]here a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." Cal. Civ. Code § 1599. The California Supreme Court has explained that "[n]otwithstanding any * * * illegal[]" contract provision, Section 1599 "preserves and enforces any lawful portion of a parties' contract that *feasibly* may be severed." *Marathon Entm't, Inc.* v. *Blasi*, 174 P.3d 741, 750-51 (Cal. 2008) (emphasis added). In construing this provision, California courts have recognized that severance has two purposes: "to prevent parties from gaining undeserved benefit or suffering undeserved detriment * * * [and] more generally, * * * to *conserve a contractual relationship* if to do so would not be condoning an illegal scheme." *MKB Mgmt., Inc.* v. *Melikian*, 184 Cal. App. 4th 796, 803-04 (2010) (emphasis added; internal quotation marks omitted).

Second, Section 1670.5(a) codifies the common law approach as applied to a contract clause that is invalid because it was unconscionable at the time it was made. In that circumstance, "the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Cal. Civ. Code § 1670.5(a). Section 1670.5 thus endows courts with extensive discretion, making the decision whether and what provisions to sever "equitable and fact specific" and requiring "case-by-case consideration." *Marathon*, 174 P.3d at 755.

That is the theory, at any rate. In practice, whether these principles are honored depends entirely on whether an arbitration agreement is at issue.

California courts frequently engage in equitable and fact specific analysis in non-arbitration cases, with a liberal preference for severability. See *Birbrower, Montalbano, Condon & Frank, P.C.* v. *Superior Court*, 949 P.2d 1, 12-13 (Cal. 1998); *FLF, Inc.* v. *Barney & Barney, LLC*, 2012 WL 4897750, at *12 (Cal. Ct. App. Oct. 16, 2012) (unpublished); *Greenlake Capital, LLC* v. *Bingo Invs., LLC*, 185 Cal. App. 4th 731, 739-40 (2010); *MKB Mgmt.*, 184 Cal. App. 4th at 803-805; *Shopoff & Cavallo LLP* v. *Hyon*, 167 Cal. App. 4th 1489, 1523-24 (2008); *Fields* v. *QSP, Inc.*, 2012 WL 2049528, at *10 (C.D. Cal. June 4, 2012).

But the approach is very different when the agreements at issue involve arbitration. In those cases, California courts instead apply a different rule that discourages severance and encourages courts to invalidate arbitration agreements in their entirety—

and virtually always results in the invalidation of the entire arbitration agreement.

The source of this rule is *Armendariz* v. *Foundation Health Psychcare Services*, in which the California Supreme Court held that refusal to sever is proper any time an "arbitration agreement contains more than one unlawful provision." 6 P.3d at 696-97. "Such multiple defects," the court said, "indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." *Id.* at 697. The trial court may accordingly conclude that such an agreement "is permeated by an unlawful purpose" as a matter of California law and is therefore wholly unenforceable. *Ibid.*

California courts mechanically apply *Armendariz*'s holding by counting the number of invalid provisions and proceeding to hold the entire arbitration contract unenforceable—and they do so consistently. In *Ontiveros* v. *DHL Express (USA), Inc.*, for example, the California Court of Appeal upheld the trial court's refusal to sever because "at least three provisions of the arbitration agreement are substantively unconscionable." 164 Cal. App. 4th 494, 515 (2008). See also, *e.g.*, *Carmona* v. *Lincoln Millennium Car Wash, Inc.*, 226 Cal. App. 4th 74, 90 (2014); *Samaniego* v. *Empire Today LLC*, 205 Cal. App. 4th 1138, 1149 (2012); *Trivedi* v. *Curexo Tech. Corp.*, 189 Cal. App. 4th 387, 398 (2010); *Lhotka* v. *Geographic Expeditions, Inc.*, 181 Cal. App. 4th 816, 826 (2010); *Martinez* v. *Master Protection Corp.*, 118 Cal. App. 4th 107, 119 (2004); *O'Hare* v. *Mun. Res. Consultants*, 107 Cal. App. 4th 267, 282 (2003); *Pinedo* v. *Premium Tobacco Stores, Inc.*, 85 Cal. App. 4th 774, 780-81 (2000).

None of these cases so much as cites California's "liberal view" favoring severance (*Facter*, 212 Cal. App. 4th at 987), much less applies it. None meaningfully analyzes whether severance is possible or whether it would serve the interests of justice. They begin and end with *Armendariz*. Nor could they apply such an approach and reach the same result—after all, in the vast majority of cases, any conclusion that enforcement of an arbitration agreement *without* unconscionable provisions conflicts with the interest of justice would itself be preempted by the FAA.

This parsimonious approach to severance—which California eschews outside the arbitration context—rests expressly on the California courts' distaste for arbitration agreements. In the words of *Armendariz*, arbitration is "an inferior forum that works to the employer's advantage." 6 P.3d at 697. This Court has warned against just this sort of "generalized attack[] on arbitration that rest[s] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants." *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79, 89-90 (2000) (internal quotation marks omitted).

Armendariz recited that under its rule, "arbitration agreements are neither favored nor disfavored, but simply placed on an equal footing with other contracts." 6 P.3d at 698. But that statement cannot conceal the clear reality: the same lower courts that mechanically apply the "multiple defects" rule describe it as applying to arbitration in particular rather than as stating a generic contractual test. See, *e.g.*, *Carmona*, 226 Cal. App. 4th at 90 ("When an arbitration agreement contains multiple unconscionable provisions * * *."); *Lhotka*, 181 Cal. App. 4th at 826 ("An

arbitration agreement can be considered permeated by unconscionability if * * * *'"); *Kuhlman* v. *New Santana Band, Inc.*, 2006 WL 1589716, at *11 (Cal. Ct. App. June 12, 2006) (unpublished) ("*Armendariz* established that more than one objectionable term in an arbitration agreement weighs against severance."); *Fitz* v. *NCR Corp.*, 118 Cal. App. 4th 702, 726 (2004) ("In *Armendariz* the California Supreme Court held that more than one unlawful provision in an arbitration agreement weighs against severance.").

And California courts in non-arbitration contexts do not appear to invoke *Armendariz* to treat the presence of more than one invalid provision as a per se basis for declaring entire contracts invalid. See *Wertheim, LLC* v. *Currency Corp.*, 2012 WL 1854944, at *14-15 (Cal. Ct. App. May 22, 2012) (unpublished) (multiple provisions in assignment agreements were void, but severable; citing *Marathon*); *Gerald F. Moore, P.C.* v. *Orthodontic Ctrs.*, 2002 WL 32351, at *7-9 (Cal. Ct. App. Jan. 11, 2002) (unpublished) (provisions dictating operating hours and requiring full-time employment unlawful, but severable in light of contractual severability provision); *A&M Produce Co.* v. *FMC Corp.*, 135 Cal. App. 3d 473, 481-82 (1982); *Mailand* v. *Burckle*, 572 P.2d 1142, 1144-45 (Cal. 1978).

Indeed, a search of publicly available decisions in the Westlaw database does not reveal *a single case* in which a California court—state or federal—has cited *Armendariz*'s "multiple defects" language outside of the arbitration context.

Of course, as the dissenting judge below pointed out, *some* arbitration agreements may be so fundamentally unfair that severance is improper. Pet. App.

10a-11a n.1 (Gould, J., concurring in part and dissenting in part) ("I recognize that one can imagine an arbitration agreement where the number and content of unconscionable provisions are so pervasive that they rebut the presumption in favor of severance."). The same is true of other types of contracts.

But *Armendariz*'s per se rule impermissibly stacks the deck against arbitration agreements, heavily weighting the analysis against severability and pretermitting the equitable analysis that applies to non-arbitration contracts. That is why the *Armendariz* rule violates Section 2's anti-discrimination mandate.

In fact, *Armendariz*'s blanket rule not only discriminates against arbitration, but also threatens to undermine the very features—"simplicity, informality, and expedition" (*Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991))—that the Supreme Court has said make this form of dispute resolution so valuable in the first place. Arbitration contracts, by their nature, will often contain a variety of procedural provisions tailoring the arbitration process to the parties' needs. As this Court recognized in *Concepcion*, this opportunity for customization is one of arbitration's main advantages:

> The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.

563 U.S. at 344-45. Under *Armendariz*, however, each one of these procedures is a possible source of invalidity—especially given the jaundiced eye with which California courts view arbitration agreements—and two unenforceable procedures will for practical purposes void the entire agreement. The likely result if the *Armendariz* rule were upheld would be arbitration agreements that are less flexible and more court-like, undermining the basic purposes of the FAA.

C. The *Armendariz* Decision As A Whole Rests On Impermissible Hostility To Arbitration

California has frequently run afoul of the FAA's basic command that arbitration agreements should be placed "upon the same footing as other contracts." *Waffle House*, 534 U.S. at 289 (internal quotation marks omitted). Time and again, this Court has had to intervene.

In 1984, for example, the Court struck down a California law that had been interpreted by the California Supreme Court to prohibit parties from agreeing to arbitrate claims under the California Franchise Investment Law. *Southland Corp.* v. *Keating*, 465 U.S. 1, 16 (1984).

Three years later, the Court invalidated a state provision providing that wage collection actions under the California Labor Law could be maintained without regard to the existence of a private arbitration agreement. *Perry* v. *Thomas*, 482 U.S. 483, 492 (1987).

Most recently, the Court found that California's rule that class-action waivers in arbitration agreements were unconscionable was inconsistent with

the FAA and was accordingly preempted. *Concepcion*, 563 U.S. at 352; see also *Preston*, 552 U.S. at 356 (FAA preempted California law granting state Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate).[3]

The Ninth Circuit's uncritical adoption of *Armendariz* will exacerbate this unfortunate trend. This Court has already recognized that it is "easy to imagine" examples as to which purportedly neutral defenses like unconscionability will "[i]n practice" be applied with "a disproportionate impact on arbitration agreements." *Concepcion*, 563 U.S. at 342. And it has observed that "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *Ibid.* (citing Stephen A. Broome, *An Unconscionable Applicable of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 54, 66 (2006); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buffalo L. Rev. 185, 186–87 (2004)).

Armendariz turbocharges such dubious unconscionability holdings by allowing courts to invalidate not just the particular provisions deemed unconscionable but the entire agreement to arbitrate, even where the objectionable snippets of the contract can be easily excised and "the remainder of the arbitration agreement can still be enforced." Pet.

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[3] In addition, this Court currently is considering *DIRECTV* v. *Imburgia*, No. 14-462, in which a California state court adopted a reading of an arbitration agreement that is so hostile to arbitration that the Ninth Circuit declared it "nonsensical" (*Murphy* v. *DIRECTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013)).

App. 8a (Gould, J., concurring in part and dissenting in part).

Indeed, *Armendariz* itself not only created an impermissible, arbitration-only rule governing severability, but applied that rule on top of unconscionability holdings that are themselves hard to reconcile with the FAA.

Armendariz was an action against an employer under the California Fair Employment and Housing Act (FEHA). The employees had signed agreements to arbitrate any wrongful termination or employment discrimination disputes. They argued, among other things, that multiple provisions of the agreement were unconscionable. The employees further contended that in the event the court found the provisions unconscionable, it should refuse to enforce the entire agreement rather than severing the objectionable provisions.

The California Supreme Court acknowledged that, under this Court's precedents, FEHA claims can sometimes be arbitrated. But it declared that agreements to arbitrate FEHA claims had to comply with "minimum requirements" unique to a "mandatory employment arbitration agreement" in order to be enforceable. *Armendariz*, 6 P.3d at 682. That is precisely what the FAA says state courts may not do: impose arbitration-specific rules to invalidate or constrain private agreements. See *Concepcion*, 563 U.S. at 333 ("Section 2's saving clause permits agreements to be invalidated by 'generally applicable contract defenses,' but not by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue.").

In justifying its list of "minimum requirements" for arbitration agreements, the California Supreme Court appeared to believe that *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), empowered it to mandate any terms that in the court's view would ensure that plaintiffs could "fully vindicate" their state-law rights in arbitration. See *Armendariz*, 6 P.3d at 681 (citing *Gilmer*, 500 U.S. at 27-28). But as this Court has recently clarified, *Gilmer* said no such thing.

In fact, this Court has explained, "[t]he 'effective vindication' exception" applies only in limited circumstances, such as when "a provision in an arbitration agreement forbid[s] the assertion of certain statutory rights," and "perhaps * * * filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310-11 (2013). That limited exception does not come close to encompassing the extensive checklist of requirements that *Armendariz* imposes.

In addition, the "effective vindication" doctrine applies, if at all, only to "invalidate agreements that prevent the 'effective vindication' of a *federal* statutory right." *American Express*, 133 S. Ct. at 2310 (emphasis added); see also *id.* at 2320 (Kagan, J., dissenting) ("a *state* law," like FEHA, "could not possibly implicate the effective-vindication rule," because "[w]hen a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA's purposes and objectives"). As Justice Kagan put it, "[w]e have no earthly interest (quite the contrary) in vindicating [a state] law" that is inconsistent with the FAA, so the state law must "automatically bow" to federal

law; any effective-vindication exception that might possibly exist would "come[] into play only when the FAA is alleged to conflict with another *federal* law." *Ibid.*

Armendariz flouted the FAA in another respect. The court thought the agreement in the case invalid because it was a contract of adhesion that required "arbitration of employee—but not employer—claims arising out of a wrongful termination." 6 P.3d at 694. That lack of perfect mutuality with respect to the claims subject to arbitration, the court held, rendered the arbitration agreement unconscionable.

Numerous other courts, however, including "[m]ost federal courts," have rejected *Armendariz*'s "mutuality" requirement for arbitration contracts otherwise supported by adequate consideration. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 757 & n.35 (Tex. 2001) (collecting cases); see also *Soto* v. *State Indus. Prods., Inc.*, 642 F.3d 67, 76-77 (1st Cir. 2011); *Oblix, Inc.* v. *Winiecki*, 374 F.3d 488, 490-91 (7th Cir. 2004).

Indeed, California in other contexts does not require every provision of every contract to be mutual. To the contrary, "[i]f the requirement of consideration is met, there is no additional requirement of * * * equivalence in the values exchanged, or mutuality of obligation." *Foley* v. *Interactive Data Corp.*, 765 P.2d 373, 381 n.14 (Cal. 1988) (internal quotation marks omitted); see also Restatement (Second) of Contracts § 79(c) (1981) ("If the requirement of consideration is met, there is no additional requirement of * * * 'mutuality of obligation.'").

Imposing an arbitration-specific mutuality rule therefore contravenes the FAA's bar on state-law

rules that "singl[e] out arbitration provisions for suspect status." *Doctor's Assocs.*, 517 U.S. at 687; see also, *e.g.*, *Concepcion*, 563 U.S. at 349; *Perry*, 482 U.S. at 492 n.9.

The *Armendariz* court also violated this Court's precedents in announcing a blanket rule that "the employer must bear the arbitration forum costs" in an "employment arbitration agreement." 6 P.3d at 689. That rule is inconsistent with *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79 (2000), which held that "the party seeking to avoid arbitration on the ground that arbitration would be prohibitively expensive * * * bears the burden of showing the likelihood of incurring such costs." *Id.* at 92.

In light of *Green Tree*, numerous federal courts have concluded that provisions requiring that arbitration forum costs be shared do not automatically render an arbitration agreement invalid. Rather, in each case the party seeking to avoid arbitration must first satisfy the court that the costs faced in arbitration actually will be prohibitive.[4] *Armendariz*'s blan-

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[4] In the Fourth Circuit's words, "the appropriate inquiry * * * focuses, among other things, upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims." *Bradford* v. *Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001). See also, *e.g.*, *Musnick* v. *King Motor Co.*, 325 F.3d 1255, 1259 (11th Cir. 2003) ("After *Green Tree*, an arbitration agreement is not unenforceable merely because it may involve some 'fee-shifting.'"); *LaPrade* v. *Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 708 (D.C. Cir. 2001) ("LaPrade makes no claim that the possibility of a large assessment arising from arbitration * * * prevented her from attempting to vindicate her rights."); *Williams* v. *Cigna Fin. Advisors Inc.*, 197 F.3d 752, 764 (5th Cir. 1999) ("Williams has not demonstrated that the arbi-

ket rule on the allocation of arbitral fees directly conflicts with those cases, which are far more faithful to *Green Tree*.

In short, *Armendariz*'s "multiple defects" anti-severability rule was tied to substantive limitations on the enforceability of arbitration agreements that are themselves highly suspect under the FAA. Both aspects of *Armendariz* stem from the same underlying hostility to enforcement of arbitration agreements—the very hostility that the FAA was enacted to eliminate.

* * *

Armendariz's arbitration-only severance rule disfavors arbitration in purpose and effect. Because the FAA forecloses precisely this type of "judicial hostility towards arbitration" (*Concepcion*, 563 U.S. at 342), the decision below cannot stand.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

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trators' order that he pay one-half of the forum fees prevented him from having a full opportunity to vindicate his claims effectively.").

Respectfully submitted.

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In The
Supreme Court of the United States

MHN GOVERNMENT SERVICES, INC. ET AL.,
Petitioners,

v.

THOMAS ZABOROWSKI ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS MHN GOVERNMENT SERVICES, INC. ET AL.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—The Voice of the Defense Bar (DRI) is an international organization that includes more than 21,000 members involved in the defense of civil litigation. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. To that end, DRI regularly participates as *amicus curiae* in cases that raise issues of vital concern to its members, their clients, and the judicial system.

This case is of significant interest to DRI because its members routinely represent clients seeking to compel arbitration of claims brought under wage and hour, consumer protection, or other state laws that are subject to binding arbitration clauses. Accordingly, DRI's members are familiar with the common occurrence of state and federal courts refusing to enforce arbitration clauses (including in class action litigation) because of state public policy, unconscionability principles, or other tenets of state law.

This case is another in a long line of state and federal court decisions refusing to enforce the

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[1] This brief was authored by *amicus curiae* and its counsel, and was not authored in whole or in part by counsel for a party. No one other than *amicus curiae*, its members, or its counsel has made any monetary contribution to the preparation or submission of this brief. All parties provided written consent to the filing of *amicus curiae* briefs, and this written consent is on file with this Court.

preemptive mandate of the Federal Arbitration Act (FAA) that arbitration clauses be enforced according to their terms. Of particular concern to DRI and its members is the Ninth Circuit's reliance on California's state-law doctrine of unconscionability, under which courts skeptical of arbitration evade the FAA's preemptive effect based on policy judgments about whether arbitration agreements are insufficiently fair. In doing so, these courts refuse to acknowledge the basic principle, embodied in the Supremacy Clause of the U.S. Constitution, that federal law preempts state laws where they stand as an obstacle to the purposes and objectives of the FAA.

The FAA was enacted to create "a body of uniform federal law governing contracts within its scope." *Medtronic AVE, Inc. v. Advanced Cardiovascular Sys., Inc.*, 247 F.3d 44, 54 (3d Cir. 2001). DRI and its members seek uniform application of the FAA across the nation in order to ensure that arbitration can achieve its basic purpose of resolving disputes efficiently, predictably, and at minimal cost. The Ninth Circuit's decision in this case, and the specific California unconscionability rules that it applies, thwart that goal. This Court should reverse.

SUMMARY OF ARGUMENT

The FAA was enacted "in response to widespread judicial hostility to arbitration," and requires courts to "'rigorously enforce' arbitration agreements according to their terms," including the terms setting "the rules under which that arbitration

will be conducted." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308-09 (2013) (citations omitted).

As this Court has recognized, "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA], including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 501 (2012) (per curiam). Unfortunately, state courts have long exhibited the very "judicial hostility towards arbitration that prompted the FAA" decades ago, and have employed "'a great variety' of 'devices and formulas'" to avoid enforcing arbitration agreements. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) (citation omitted).

In recent years, state court resistance to arbitration agreements has been based on § 2 of the FAA, which provides that arbitration agreements must be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2012). Reasoning that unconscionability is a state contract law doctrine that can render "any contract" unenforceable, state courts have increasingly held arbitration agreements unenforceable by applying arbitration-specific unconscionability rules that are avowed to be only general principles of state unconscionability law even as they actually cloak a hostility to arbitration. The difficulty of determining whether an unconscionability analysis is being applied evenhandedly to an arbitration agreement has allowed these state courts to nullify arbitration agreements

under the guise of § 2's saving clause based on state policy grounds that are hostile to arbitration.

Recognizing this potential for manipulation of the unconscionability doctrine to evade FAA preemption, this Court held in *Concepcion* that "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms'" and that states cannot—whether in the guise of unconscionability, public policy, or some other state-law defense—"require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 563 U.S. at 343, 350 (citation omitted). The Court held that the FAA preempts such defenses where they "have a disproportionate impact on arbitration agreements" even though these defenses "presumably apply" to all contracts, because "a doctrine normally thought to be generally applicable, such as . . . unconscionability," can be "applied in a fashion that disfavors arbitration." *Id.* at 340-41. The Court concluded that the FAA preempts unconscionability defenses that would allow a state court to invalidate an arbitration agreement because it prescribes procedures that are undesirable for state policy reasons. *See id.* at 340-43, 349-51.

Despite *Concepcion*'s sharp rebuke that "California's courts" in particular "have been more likely" to apply their own state unconscionability laws to preclude the enforcement of arbitration agreements, *id.* at 341, courts applying California law have persisted in using arbitration-specific unconscionability rules as a rationale to resist the mandate of the FAA. The decisions of the district court and the Ninth

Circuit in this case are examples of this continuing post-*Concepcion* trend.

Both courts interpreted the arbitration clause in the standard counseling services contract of MHN Government Services, Inc. (MHN) by looking to California law—and Ninth Circuit cases interpreting California law—directly overruled by or in direct conflict with *Concepcion*. *See, e.g.*, Pet. App. 3a-5a, 19a. The lower courts' application of California law violates the Supremacy Clause of the U.S. Constitution, and California may not "opt out" of the Supremacy Clause. "When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established. See U.S. Const., Art. VI, cl. 2." *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (per curiam).

This brief will trace the history of California's efforts, both before and after *Concepcion*, to apply state-law unconscionability rules to avoid enforcing arbitration agreements according to their terms, as mandated by the FAA. Incorrect and disproportionate use of the unconscionability doctrine has permitted California courts to invalidate arbitration agreements they deem too unfair or one-sided, an analysis preempted by the FAA because it rests on policy judgments about the efficacy of arbitration for the vindication of a litigant's rights. Furthermore, California's unconscionability standards are preempted by the FAA because they take their meaning from the fact that an arbitration agreement is at issue, and as applied have a disproportionate impact on such agreements, particularly when California's state-law

severability rule is simultaneously applied in a manner unique to arbitration agreements. Finally, this brief will explain that, rather than applying ill-defined standards of fairness under the guise of an unconscionability analysis, courts should be limited to invalidating arbitration agreements based on unconscionability only when required to do so by constitutional due process requirements.

ARGUMENT

I. THE FAA PREEMPTS CALIFORNIA'S ARBITRATION-SPECIFIC UNCONSCIONABILITY RULES.

A. The question presented in this case encompasses whether California's unconscionability test, as applied to arbitration agreements, is preempted by the FAA.

The petition for a writ of certiorari here presents the question "whether California's arbitration-only severability rule is preempted by the FAA." Pet. i. As respondents concede, "[t]he significance of any impact that California's severance doctrine may have on the FAA's objectives depends, in the first instance, on the scope of the state's unconscionability doctrine." Pet. Opp. 32-33. This is unsurprising because, under California law, questions about whether specific terms can be severed from an arbitration agreement come into play only *after* a court first deems those terms to be unconscionable pursuant to state law, and this

severability analysis turns on the degree to which an "unconscionable taint" permeates the agreement. *See Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 121-25, 6 P.3d 669, 695-97 (2000). Consequently, the extent to which the California rules governing whether an arbitration agreement is unconscionable contravene the FAA necessarily influences how a court will assess the "unconscionable taint" in the agreement and apply the arbitration-only severability rule.

Because California's unconscionability rules are inextricably intertwined with the state's severability rule, this Court—in resolving whether California's arbitration-only severability rule is preempted by the FAA—can and should decide the antecedent question whether the FAA preempts California's unconscionability rules as applied to arbitration agreements.[2]

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[2] This Court's "power to decide [issues] is not limited by the precise terms of the question presented." *Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978). Rather, that power extends to any question "essential" to the disposition of the issues in a case. *United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980); *see also Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173 n.1 (2009) ("[T]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." (citation omitted)).

B. The FAA precludes a court from refusing to enforce an arbitration agreement on the ground that its terms are undesirable as a matter of state public policy.

Before Congress enacted the FAA in 1925, courts viewed arbitration with disfavor in no small measure because of "judges' paternalistic attitude that only they could ensure that individual plaintiffs would be afforded a fair opportunity to challenge corporate defendants." Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 42 (2006). Congress enacted the FAA to overcome this judicial hostility to arbitration agreements by requiring courts to place them "on an equal footing with other contracts" and "enforce them according to their terms." *Concepcion*, 563 U.S. at 338. The FAA preempts any contrary state law and is binding on state courts as well as federal. *Southland Corp. v. Keating*, 465 U.S. 1, 10-17 (1984).

Congress tempered the FAA's mandate to respect parties' freedom of contract by including in the FAA a saving clause that preserves from preemption generally applicable state-law contract defenses. 9 U.S.C. § 2; *see Concepcion*, 563 U.S. at 342. But even a contract defense that a state court characterizes as "generally applicable" is preempted by the FAA if the defense "'stands as an obstacle to the accomplishment and execution of the full purposes'" of the FAA. *Concepcion*, 563 U.S. at 340-42, 351 (citation omitted).

Concepcion held that the FAA preempted the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 113 P.3d 1100 (2005), which had applied California's unconscionability standards to prohibit class action waivers in arbitration contracts. *Concepcion*, 563 U.S. at 339, 351. *Concepcion* emphasized that, while the FAA's saving clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,'" the FAA preempts such defenses where they "have a disproportionate impact on arbitration agreements" even though these defenses "presumably apply" to all contracts. *Id.* at 338, 341 (citation omitted). *Concepcion* concluded that the FAA preempts unconscionability or public policy defenses that would allow a state court to invalidate an arbitration agreement on the ground it prescribes procedures that are undesirable for state policy reasons. *See id.* at 340-43, 349-51.[3]

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[3] Justice Thomas offered an additional basis for finding state-law unconscionability and public policy defenses preempted by the FAA when applied to invalidate an arbitration agreement. The saving clause in § 2 of the FAA, read in harmony with the plain language of the FAA's other provisions,

> require[s] enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake. Contract defenses unrelated to the making of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause.

(continued...)

In sum, *Concepcion* "found *Discover Bank* objectionable" because *Discover Bank* "allowed courts to ignore and refuse to enforce the clear terms of the parties' agreement, and instead employ a judicial policy judgment" that a procedure to which the parties did not contractually agree "would better promote the vindication of the parties' rights in certain cases." *Truly Nolen of Am. v. Superior Court*, 208 Cal. App. 4th 487, 506, 145 Cal. Rptr. 3d 432, 445 (2012); *see Italian Colors*, 133 S. Ct. at 2308-09 (holding that the FAA requires courts to "'rigorously enforce' arbitration agreements according to their terms," including the terms setting "the rules under which that arbitration will be conducted" (citation omitted)); *see also Italian Colors*, 133 S.Ct. at 2313 (Thomas, J., concurring) ("Italian Colors voluntarily entered into a contract containing a bilateral arbitration provision. It cannot

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(...continued)
Concepcion, 563 U.S. at 351-56 (Thomas, J., concurring) (citation omitted). The "[r]efusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made" under California law. *Id.* at 356 (Thomas, J., concurring); *see also Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1212, 1215 (11th Cir. 2011) (applying Justice Thomas's analysis in *Concepcion* to affirm an order compelling arbitration in part because plaintiffs argued the arbitration agreement violated "public policy" and thus did "not allege any defects in the formation of the contract"). Justice Thomas therefore concluded that the FAA's saving clause did not preserve from preemption *Discover Bank*'s "'unconscionab[ility]'" rule because the rule was grounded in state public policy considerations rather than predicated on a concern for the making of a contract. *Concepcion*, 563 U.S. at 355-56 (Thomas, J., concurring).

now escape its obligations merely because the claim it wishes to bring might be economically infeasible.").

C. California's long resistance to FAA preemption based on arbitration-specific standards has continued unabated after *Concepcion*.

The Ninth Circuit's effort in this case to circumvent the FAA under the guise of applying a "neutral" California unconscionability rule is not a unique occurrence, but merely one example of a long-standing hostility among the state and lower federal courts towards the FAA. Notwithstanding this Court's rulings to the contrary, California courts aggressively refuse to enforce arbitration agreements. *See Concepcion*, 563 U.S. at 341. Time and again, this Court has been called on to eliminate barriers to arbitration put in place by California's legislature and courts. *See, e.g., id.* at 337-51; *Preston v. Ferrer*, 552 U.S. 346, 349-63 (2008); *Perry v. Thomas*, 482 U.S. 483, 488-93 (1987); *Southland Corp.*, 465 U.S. at 10-17

A brief history of the arbitration-specific unconscionability doctrine employed by the California Supreme Court—both before and after *Concepcion*—will provide useful context for assessing California's resistance to this Court's FAA precedents:

1. ***Armendariz.*** In *Armendariz*, the California Supreme Court held that as a matter of state public policy courts can refuse to enforce mandatory employment agreements to arbitrate unwaivable state statutory claims for employment discrimination if they deem the arbitration clause at

issue to be unconscionable. 24 Cal. 4th at 90-91, 99-103, 6 P.3d at 674, 679-82. Rather than apply general principles of unconscionability law to make that determination, the court instead invented arbitration-specific rules mandating a "modicum of bilaterality" in arbitration—i.e., that an arbitration clause required as a condition of employment must apply to both claims more likely to be brought by an employer and claims more likely to be brought by an employee. *Id.* at 117-19, 6 P.3d at 692-93. In reaching the conclusion that an arbitration clause cannot be too one-sided, the California Supreme Court rejected the notion that its version of unconscionability law impermissibly "takes its meaning precisely from the fact that a contract to arbitrate is at issue," *Perry*, 482 U.S. at 492 n.9, and thus was preempted by the FAA. Instead, it held that "ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context." *Armendariz*, 24 Cal. 4th at 119, 6 P.3d at 693.

Applying this standard, the California Supreme Court concluded the arbitration agreement in *Armendariz* was "unconscionably unilateral" where it violated state public policy. *Id.* at 91, 121, 6 P.3d at 674, 694.

2. ***Little.*** Several years after *Armendariz*, in *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 63 P.3d 979 (2003), the California Supreme Court reiterated *Armendariz*'s state public policy limitation on the enforceability of arbitration agreements governed by the FAA, and further developed California's arbitration-specific unconscionability rules. *See id.* at 1071-81, 63 P.3d at 983-90. *Little* held that one type of

substantively unconscionable arbitration clause originates with "the party imposing arbitration [who] mandates a post-arbitration proceeding, either judicial or arbitral, wholly or largely to its benefit at the expense of the party on which the arbitration is imposed." *Id.* at 1072, 63 P.3d at 984. The court then invalidated a contractual term authorizing either party to appeal to a second arbitrator from an arbitral award exceeding $50,000, concluding it would unduly favor defendants over plaintiffs. *Id.* at 1071 74, 63 P.3d at 983-85.

3. ***Discover Bank.*** Two years later, in *Discover Bank*, the California Supreme Court addressed whether courts may invalidate class action arbitration waivers pursuant to an unconscionability defense. 36 Cal. 4th at 152-53, 160-63, 113 P.3d at 1103, 1108-10. The California Supreme Court held that because class actions and arbitrations are "often inextricably linked to the vindication" of substantive state rights, class arbitration waivers are contrary to California public policy and therefore unconscionable when class actions are the only effective way to halt and redress wrongful conduct. *Id.* at 160-63, 113 P.3d at 1108-10. *Discover Bank* held that the FAA did not preempt its unconscionability holding because, while specifically tailored to arbitration agreements, the unconscionability determination could be traced to a general state public policy against exculpatory contracts. *See id.* at 163-67, 113 P.3d at 1110-13.

4. ***Sonic I.*** In *Sonic-Calabasas A, Inc. v. Moreno* (*Sonic I*), 51 Cal. 4th 659, 247 P.3d 130 (2011), a decision issued just two months before *Concepcion*, the California Supreme Court concluded that an

agreement to resolve disputes through arbitration impermissibly waived the "advantages" of certain procedures that California laws made available to employees who pursue state statutory wage claims in an administrative proceeding before the state Labor Commissioner's office. *See id.* at 668-69, 671-72, 679, 681 n.4, 247 P.3d at 133-35, 140-41, 142 n.4. The California Supreme Court concluded that substituting arbitration as an alternative to the Labor Commissioner procedures violated California public policy and rendered the agreement unconscionable as written. *Id.* at 678-84, 686-87, 247 P.3d at 140-44, 145-46. Applying the reasoning of *Discover Bank*, the court also held that this result was not preempted by the FAA. *Id.* at 687-95, 247 P.3d at 146-52.

5. ***Sonic II.*** This Court vacated *Sonic I* and remanded for reconsideration in light of *Concepcion*. *See Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011). On remand, the California Supreme Court addressed whether any barrier to the vindication of a plaintiff's right to recover unpaid wages under California law "would make the arbitration agreement unconscionable or otherwise unenforceable . . . and, if so, whether such a rule would be preempted by the FAA." *Sonic-Calabasas A, Inc. v. Moreno* (*Sonic II*), 57 Cal. 4th 1109, 1142, 311 P.3d 184, 200 (2013).

The California Supreme Court noted that, when an employee elects to pursue his state statutory right to recover unpaid wages before the Labor Commissioner rather than in court, state law affords the employee certain hearing and posthearing procedures that are designed to "reduc[e] the costs and risks of pursuing a wage claim in several ways." *Id.* at

1129, 311 P.3d at 191. The court held it appropriate to consider whether agreed-upon arbitration procedures fail to include these statutory procedures, and whether the absence of these procedures fails to "provide an employee with an accessible and affordable arbitral forum for resolving wage disputes." *Id.* at 1146, 311 P.3d at 203.

In the court's view, this unconscionability standard survived FAA preemption even after *Concepcion* and *Italian Colors*. Relying on *Armendariz*, which preceded both decisions, the majority maintained that the FAA allows state courts to refuse to enforce agreements to arbitrate state statutory claims where arbitration would not afford procedural benefits that plaintiffs would have received outside arbitration. *Id.* at 1150-52, 311 P.3d at 206-08 (citing *Armendariz*, 24 Cal. 4th at 98-99, 6 P.3d at 679-80).

Justice Chin's dissenting opinion explained that the majority's decision—which concluded that courts have the power to create state-law rules "uniquely in the context of arbitration," *id.* at 1143, 311 P.3d at 201 (majority opinion)—impermissibly applied a state-law contract defense to an arbitration agreement based on the uniqueness of that agreement, *id.* at 1190-91, 311 P.3d at 235 (Chin, J., concurring in part & dissenting in part). However, "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . the state legislature cannot.'" *Concepcion*, 563 U.S. at 340 (citation omitted). Such an arbitration-specific rule is preempted by the FAA because it has "a

disproportionate impact on arbitration agreements." *Id.* at 341. By grounding its analysis on an unconscionability standard that is peculiar to arbitration, *Sonic II*'s development of a "unique rule" for arbitration agreements flouted *Concepcion*. *Sonic II*, 57 Cal. 4th at 1190-91, 311 P.3d at 235 (Chin, J., concurring in part & dissenting in part).

6. ***Sanchez.*** Most recently, in *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 353 P.3d 741 (2015), the California Supreme Court reversed a lower court decision holding an arbitration agreement in an automobile sales contract unenforceable on unconscionability grounds. But the California Supreme Court reaffirmed that arbitration provisions *may* be found unconscionable if they "'contravene the public interest or public policy,'" *id.* at 911, 353 P.3d at 748 (citation omitted), and approved "using [the] unconscionability doctrine on a case-by-case basis to protect . consumers against fees that unreasonably limit access to arbitration," *id.* at 920, 353 P.3d at 755.

The California Supreme Court rejected the premise that the FAA preempts such unconscionability rules after *Concepcion*. *See id.* at 906-07, 912-13, 920-21, 353 P.3d at 745-46, 749-50, 755-56. The court emphasized that the FAA does not preempt unconscionability defenses, *id.* at 906, 353 P.3d at 745-46, even though *Concepcion* had concluded the FAA preempted *Discover Bank*'s unconscionability rules, *Concepcion*, 563 U.S. at 337-51. Adhering to *Sonic II*'s interpretation of *Concepcion*, the court held that the FAA does not preclude states from applying their unconscionability rules to ensure that the "arbitral scheme set forth in a contract is in practice 'an

accessible, affordable process for resolving . . disputes.'" *Sanchez*, 61 Cal. 4th at 921, 353 P.3d at 756 (citation omitted).

In his dissenting opinion, Justice Chin noted that after *Italian Colors*, it is clear "the FAA preempts the majority's rule insofar as it makes a 'substantial deterrent effect' sufficient to establish substantive unconscionability." *Id.* at 942, 353 P.3d at 770 (Chin, J., concurring in part & dissenting in part). The dissent further explained that under this Court's "binding precedent, if a cost provision does not impose fees that 'make access to the forum impracticable' . . then the FAA precludes a court from invalidating it as unconscionable because of a subjective determination that it will, in a particular case, 'have a substantial deterrent effect' on a party's exercise of the right to request a second arbitration." *Id.* at 942, 353 P.3d at 770-71 (Chin, J., concurring in part & dissenting in part) (citations omitted).

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Consistent with its own arbitration unconscionability jurisprudence, the California Supreme Court has given California's intermediate appellate courts virtually free rein in using the unconscionability doctrine to resist *Concepcion*. In multiple cases in which California's intermediate appellate courts have invalidated arbitration agreements on the ground they are substantively unconscionable, the California Supreme Court has denied review, allowing such decisions to stand. *See, e.g., Pinela v. Neiman Marcus Grp., Inc.*, 238 Cal. App. 4th 227, 250, 190 Cal. Rptr. 3d 159, 178-79 (2015),

review denied, Sept. 16, 2015; *Elite Logistics Corp. v. Wan Hai Lines, Ltd.*, B252543, 2015 WL 3522606, at *1 (Cal. Ct. App. June 4, 2015), *review denied*, Sept. 9, 2015; *Woods v. JFK Mem'l Hosp., Inc.*, G050286, 2014 WL 5475231, at *1 (Cal. Ct. App. Oct. 30, 2014), *review denied*, Jan. 21, 2015; *Samaniego v. Empire Today LLC*, 205 Cal. App. 4th 1138, 1141-42, 140 Cal. Rptr. 3d 492, 495 (2012), *review denied*, July 11, 2012; *Wherry v. Award, Inc.*, 192 Cal. App. 4th 1242, 1245, 123 Cal. Rptr. 3d 1, 3 (2011), *review denied*, Apr. 27, 2011.

The Ninth Circuit has sided with California courts in determining that California's application of the unconscionability doctrine to invalidate arbitration agreements is not preempted by the FAA. In *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916 (9th Cir. 2013), which the panel below found controlling when it rejected the petitioner's FAA preemption arguments in the present case, *see* Pet. App. 5a-6a, the Ninth Circuit applied the unconscionability rules articulated by the California Supreme Court in *Armendariz* to hold unconscionable an arbitration provision that effectively gave the power to select the arbitrator to the party not requesting arbitration. The Ninth Circuit acknowledged that "the FAA preempts state laws having a 'disproportionate impact' on arbitration" and that "any state law that invalidated this provision would have a disproportionate impact on arbitration because the term is arbitration specific." *Id.* at 927. But the court reasoned that state law must be able to "require some level of fairness in an arbitration agreement" and that the "FAA does not preempt [California law's] invalidation of [the]

arbitration policy" so long as it "reflects a generally applicable [state] policy against abuses of bargaining power." *Id.*

D. California's unconscionability standards are preempted because they permit courts to invalidate arbitration agreements based on state policy concerns about fairness.

Although California courts have employed a variety of verbal formulations to describe the standard for determining whether a contract is substantively unconscionable, "all mean the same thing": "[t]he ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." *Sanchez*, 61 Cal. 4th at 911-12, 353 P.3d at 749.

But normative judgments about the fairness of arbitration procedures are not a basis for invalidating arbitration agreements governed by the FAA. A court's determination that an arbitration agreement is "sufficiently unfair" under state law—and therefore unconscionable—embodies little more than a *state* policy judgment about the efficacy of arbitration as a forum for vindicating a plaintiff's rights. *See, e.g.*, *id.* at 911 12, 353 P.3d at 748-49 (holding that contract's terms are unconscionable if they "contravene the public interest or public policy"); *Sonic II*, 57 Cal. 4th at 1145-46, 1154-55, 311 P.3d at 202-03, 209 (unconscionability rules are concerned with whether terms "'contravene the public interest or public policy'" and courts may therefore consider whether the parties' agreed-upon arbitration procedures are unconscionable if they fail

to include procedural protections available to an employee outside of arbitration as those protections would help "vindicate" the employee's state statutory rights (citation omitted)). As commentators have noted, the California Supreme Court has expressed "deeply rooted doubts regarding the fairness of arbitration," especially "in an employment setting." Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 84.

After *Concepcion*, such a policy judgment clashes with the FAA's mandate that courts enforce arbitration agreements according to their terms. As this Court recently confirmed, the FAA requires courts to "'rigorously enforce' arbitration agreements according to their terms," including the terms setting "the rules under which that arbitration will be conducted." *Italian Colors*, 133 S. Ct. at 2309 (citations omitted). In other words, the FAA itself imposes a binding policy judgment, which cannot be superseded by state public policy in the guise of an unconscionability rule. *See Concepcion*, 563 U.S. at 350 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."); *see also id.* at 354-56 (Thomas, J., concurring) (concluding that the FAA preempted a California unconscionability rule grounded in state public policy because a state's "public policy" concerns "could not be the basis for declining to enforce an arbitration clause" under the FAA).

Consistent with the FAA, therefore, courts cannot invalidate arbitration agreements based on a

finding that the agreement is insufficiently fair as a matter of state policy, as embodied in the state's unconscionability standards. *See THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162, 1169-70 (10th Cir. 2014) (where arbitration agreement is allegedly unconscionable because it is unfair, "the heart of the asserted unfairness is the disparity" between arbitration and litigation outside the arbitral forum and the supposed lack of fairness therefore reflects a state "policy hostile to arbitration" that is "'impermissible'" under the FAA (citation omitted)). Accordingly, California's formulations of the unconscionability standard—based as they are on an assessment of fairness as a matter of state policy—conflict with *Concepcion*, *Italian Colors*, and the decisions of lower courts that have faithfully followed the Supreme Court's interpretation of the FAA.

E. The FAA also preempts the specific unconscionability standard that was applied here because it relies on the uniqueness of an arbitration agreement and has a disproportionate impact on such agreements.

The formulation of the unconscionability standard that the district court and the Ninth Circuit applied in this case is an especially egregious rule at odds with *Concepcion* and *Italian Colors*. The district court, citing the California Supreme Court's decision in *Armendariz*, concluded that "[a]n arbitration provision is substantively unconscionable if it is 'overly harsh' or generates "'one-sided results.'" Pet. App. 19a. The Ninth Circuit likewise looked to whether any arbitration provision was "'unjustifiably one-sided.'"

Pet. App. 3a. Although the panel quoted the Ninth Circuit's earlier decision in *Chavarria* for this unconscionability rule, *id.*, *Chavarria* simply applied the unconscionability rules from *Armendariz* and its progeny, *Chavarria*, 733 F.3d at 921-23.

But as the California Supreme Court itself acknowledged before *Concepcion* was decided, an unconscionability standard that focuses on whether an employment agreement to arbitrate statutory claims is too "one-sided" is "peculiar to the arbitration context." *Armendariz*, 24 Cal. 4th at 117-20, 6 P.3d at 692-94; *see Gray v. Conseco, Inc.*, No. SA CV 00-322 DOC (EEX), 2000 WL 1480273, at *4 (C.D. Cal. Sept. 29, 2000) ("Under California law, other non-mutual contract provisions are valid and not unconscionable. The language used by the California Supreme Court in the *Armendariz* opinion itself demonstrates that the rule singles out and imposes a special burden on arbitration agreements . . ." (citation omitted)). This is so because it turns on an examination of whether an employer has "impose[d] a system of arbitration on an employee that seeks to maximize the advantages and minimize the disadvantages of arbitration for itself at the employee's expense." *Armendariz*, 24 Cal. 4th at 118-20, 6 P.3d at 692-94.

As commentators have observed, "California courts—and the Ninth Circuit—have taken the FAA's 'savings clause' where no court ha[d] gone before" *Armendariz*. McGuinness & Karr, *supra*, at 62. "With only a few exceptions, arbitration agreements that have been evaluated under California's post-*Armendariz* law have been held invalid under the 'generally applicable contract defense' of

unconscionability." *Id.* Based on *Armendariz* and its progeny, "[t]he FAA's savings clause, which was enacted with the aim of placing arbitration agreements 'on equal footing with other contracts,' is now used as the platform to strike them down in legion." *Id.*

The California Supreme Court's view that its arbitration-specific "modicum of bilaterality" test is not preempted by the FAA is wholly untenable. *See Concepcion*, 563 U.S. at 341-42 (state courts may not use unconscionability doctrine to impose particular arbitral procedures based on perception they will prevent one party from having an undue advantage in arbitration over the other); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (holding that "challenges to the adequacy of arbitration procedures" in arbitration agreements governed by the FAA were "insufficient to preclude arbitration of statutory claims").

Indeed, *Concepcion* held "that a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.'" *Concepcion*, 563 U.S. at 341 (citation omitted). As an illustration of such a prohibited unconscionability standard, this Court disapproved state-law doctrines finding unconscionable agreed-upon arbitration procedures that "would be of greater benefit" to the defendant than to the plaintiff. *Id.* at 341-42. *Concepcion* pointed out that while such a mutuality rule is nominally a generally applicable contract defense in that it applies to "'any' contract," the rule would "[i]n practice have a disproportionate impact on arbitration agreements . " *Id.* at 342. Thus, a court cannot

disapprove on unconscionability grounds a provision that merely specifies the procedures to be followed, even if that provision benefits one party more than another, because the FAA protects the right of parties to arbitrate according to specific rules or to limit the issues to be arbitrated. *See id.* at 343-45 (recognizing that the FAA protects parties' right to limit the issues to be arbitrated, to arbitrate according to specific rules, and to limit with whom they will arbitrate).

Hence, after *Concepcion*, the FAA preempts an unconscionability test that relies on the uniqueness of an arbitration agreement by deeming such an agreement unconscionable, and therefore unenforceable, because the arbitration procedures set by the agreement are too one-sided. As Justice Chin's dissenting opinion in *Sanchez* explained, "the FAA *requires* that [California's] standard for unconscionability be 'the same for arbitration and nonarbitration agreements,'" but the California Supreme Court "first articulated the 'unfairly one-sided' formulation [of the unconscionability test] specifically in the context of an unconscionability challenge *to an arbitration provision*, and the formulation has since been used almost exclusively in that context." *Sanchez*, 61 Cal. 4th at 937, 353 P.3d at 767 (Chin, J., concurring in part & dissenting in part) (citation omitted). Under *Concepcion*, the FAA sweeps away unconscionability rules that "have a disproportionate impact on arbitration agreements," even if they are rules that would supposedly apply to all contracts. *Concepcion*, 563 U.S. at 342.

It is this rigid bilaterality standard's peculiar focus on the uniqueness of an arbitration agreement

that led the Alabama Supreme Court to refuse to adopt such a rule on the ground it was barred by the FAA. *See Ex parte McNaughton*, 728 So. 2d 592, 598-99 (Ala. 1998). As the Alabama Supreme Court explained, the standard "directly depends on arbitration for its application" and therefore impermissibly "assigns a suspect status to arbitration agreements." *Id.* at 598; *see also Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 600 (6th Cir. 2013) (arbitration procedure could not be found unconscionable so as to defeat FAA preemption, even though arbitration clause was adhesive and one-sided, because "all of these things—the one-sided nature of the arbitration clause, and its adhesive nature—were also present" in *Italian Colors*, which found an arbitration agreement enforceable "all of those concerns notwithstanding"); *Gray*, 2000 WL 1480273, at *4 ("out of deference to the federal policy favoring arbitration," refusing to apply *Armendariz*'s unconscionability test because it "singles out and imposes a special burden on arbitration agreements"); *Torrence v. Nationwide Budget Fin.*, 753 S.E.2d 802, 811-12 (N.C. Ct. App. 2014) (after *Concepcion*, "the one-sided quality of an arbitration agreement is not sufficient to find it substantively unconscionable" in cases governed by the FAA).

Empirical data confirms that an unconscionability standard that takes its meaning precisely from the fact that an agreement to arbitrate is at issue will necessarily have a disproportionate impact on arbitration agreements. Based on a study of California unconscionability jurisprudence that this Court cited in *Concepcion*, 563 U.S. at 342-43, one commentator has explained that "California courts are

clearly biased against arbitration as an alternative means of dispute settlement" and "[t]heir disdain manifests" in the standard they apply to assess whether arbitration agreements are enforceable. Broome, *supra*, at 41. The Broome study demonstrated that the unconscionability standard used by the Ninth Circuit in this case imposes "arbitration-specific" requirements and that, under California's jurisprudence predating *Concepcion*, "'unconscionable' means something quite different when the validity of an arbitration agreement is at issue." *Id.* at 53-55, 67-68.

A follow-up study of 119 California state court decisions issued between 2005 and 2008 made findings that "confirm[ed] those of Professor Broome." Paul Thomas, Note, *Conscionable Judging: A Case Study of California Courts' Grapple with Challenges to Mandatory Arbitration Agreements*, 62 Hastings L.J. 1065, 1082-84 (2011). The data shows that under California law "very few contracts are voided as unconscionable—unless they can be classified as 'agreements to arbitrate which appear to be biased against the weaker party.'" *Id.* at 1070. This study concluded that in California "unconscionability challenges to arbitration agreements succeed at a higher rate than unconscionability challenges to other agreements," *id.* at 1074, and that "[c]ourts applying California law are most likely discriminating against arbitration agreements in a manner that is preempted by the interpretation of the FAA advanced by the Supreme Court," *id.* at 1084; *see also* McGuinness & Karr, *supra*, at 62 ("California has created a new brand

of unconscionability. It is far more demanding—and it is unique to arbitration.").

This phenomenon is not limited to California. A nationwide analysis of federal and state court decisions between the years 1994 and 2007 found that as this Court has closed off other means of resisting arbitration, state law unconscionability doctrines have become "new tools" that are "being used to limit arbitration" and strike down arbitration agreements. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1440-43 & n.85 (2008). "Where unconscionability challenges once appeared in less than 1% of all arbitration-related cases, more recently they have appeared in 15-20% of all cases involving arbitration." *Id.* at 1441; *see also* Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buff. L. Rev. 185, 194 (2004) (concluding that after this Court had blocked other challenges to arbitration, unconscionability challenges to arbitration agreements came to represent two-thirds of all unconscionability challenges (161 out of 235) and succeeded at twice the rate of unconscionability arguments directed at other types of contracts); Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 Wake Forest L. Rev. 1001, 1034 (1996) ("Judicial decisions apply unconscionability, and other common law doctrines, more aggressively to arbitration agreements than to other contracts.").

Disproportionate application of the unconscionability doctrine to arbitration agreements can be explained only as a manifestation of hostility to

arbitration. "[I]t is well known that unconscionability is generally a loser of an argument" and in the non-arbitration context "has been mostly in intellectual retreat for various reasons." Bruhl, *supra*, at 1442. The increasing use of unconscionability has therefore "been aptly described by scholars as an attempt, using one of the few tools remaining, to put the brakes on the pro-arbitration trend and restore some sort of balance." *Id.* at 1442-43. Because "it will often be nearly impossible to tell if a court is applying state unconscionability doctrine evenhandedly in the way the FAA requires," unconscionability provides a means for courts "to misapply, or perhaps even manipulate, state contract doctrines so as to nullify arbitration agreements while simultaneously frustrating the ability of reviewing courts to reverse." *Id.* at 1422, 1449.

II. RATHER THAN APPLYING ILL-DEFINED STANDARDS OF FAIRNESS BASED ON STATE PUBLIC POLICY, COURTS SHOULD DEEM ARBITRATION AGREEMENTS UNCONSCIONABLE ONLY WHEN REQUIRED BY DUE PROCESS.

Some argue that arbitration provisions are found unconscionable more often than ordinary contract provisions because they actually *are* more often unfair than other types of provisions, apart from the requirement of arbitration itself. But even if that were true—and there is no evidence that is the case[4]—

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[4] As this Court has explained, "streamlined procedures of arbitration do not entail any consequential restriction on (continued...)

it would not justify courts in applying freewheeling and subjective unfairness standards based on state public policy to advance preferred outcomes while evading review on FAA preemption grounds.[5]

Assessing whether an arbitration agreement is insufficiently fair—and therefore unconscionable—embodies a state policy judgment about the utility of arbitration in vindicating rights. *See supra*, at 8-11. Under *Concepcion*, such policy judgments cannot override the FAA's mandate requiring courts to enforce

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(...continued)
substantive rights." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987). "[T]here is nothing inherently unfair or oppressive about arbitration clauses." *Coleman v. Prudential Bache Sec.*, 802 F.2d 1350, 1352 (11th Cir. 1986). Thus, an "employee's 'generalized attacks' on 'the adequacy of arbitration procedures'" are "insufficient to preclude arbitration of statutory claims." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009) (citation omitted).

[5] The glaring and untenable inconsistencies that can result from such subjective policy judgments are illustrated by *Woods*, 2014 WL 5475231, in which a California intermediate appellate court found an arbitration agreement to be substantively unconscionable because it lacked sufficient mutuality and was unfairly one-sided. *Id.* at *6-*8. But the very same (or materially similar) arbitration agreement has been held enforceable by multiple other California appellate courts, including by a different, earlier panel of the same appellate court that decided *Woods*: *Willis v. Prime Healthcare Servs., Inc.*, 231 Cal. App. 4th 615, 618-34, 180 Cal. Rptr. 3d 297, 298-310 (2014); *McElroy v. Tenet Health Care Corp.*, G047300, 2013 WL 4482928, at *3-*6 (Cal. Ct. App. Aug. 21, 2013); *Mercado v. Doctors Med. Ctr. of Modesto, Inc.*, F064478, 2013 WL 3892990, at *2-*8 (Cal. Ct. App. July 26, 2013); *accord Jaffe v. Zamora*, 57 F. Supp. 3d 1244, 1245-48 (C.D. Cal. 2014).

arbitration agreements according to their terms. To adhere to this directive, yet protect against truly unconscionable arbitration terms, this Court should require state courts applying an unconscionability analysis to do so based on constitutional due process standards, rather than on ill-defined and inherently subjective assessments of whether an arbitration agreement is insufficiently fair. The FAA already contains restrictions on arbitration procedures that are designed to protect such due process rights. *See* 9 U.S.C. §§ 10-11 (2012). Those statutory protections, supplemented as appropriate by due process jurisprudence, should be the basis for any substantive unconscionability standard in the arbitration context.

Under the FAA, a fundamentally fair arbitration is one that occurs with proper "notice" of the arbitration and the "opportunity to be heard and to present relevant and material evidence and argument" before arbitrators who "are not infected with bias." *Bowles Fin. Grp. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1012-13 (10th Cir. 1994); *see Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997) (section 10(a)(3) of the FAA codifies a "fundamental fairness" standard pursuant to which "an arbitrator 'must give each of the parties to the dispute an adequate opportunity to present its evidence and argument'" (citation omitted)). Such restrictions (along with others) that are codified as part of the FAA for actions pending in federal court, *e.g.*, 9 U.S.C. § 10(a)(2)-(3), are considered due process limitations. *See Biller v. Toyota Motor Corp.*, 668 F.3d 655, 663-64 (9th Cir. 2012) (grounds for vacatur of arbitration award under FAA are "'designed to preserve due process'" (citation

omitted)); *Prudential Sec., Inc. v. Dalton*, 929 F. Supp. 1411, 1417 (N.D. Okla. 1996) ("fundamental fairness" restrictions on "arbitration process" are "fundamental due process" limitations).

These fairness limitations are "not to be equated with the full panoply of judicial procedural safeguards and legal 'niceties' of the courtroom" because "[d]ue process in arbitration means satisfying 'minimal requirements of fairness.'" *McMahan & Co. v. Dunn Newfund I, Ltd.*, 656 N.Y.S.2d 620, 621, 230 A.D.2d 1, 4 (App. Div. 1997) (citation omitted). But that is by congressional design, and state court efforts based on state public policies of fairness that attempt to impose procedures more closely approximating courtroom litigation upend the balance Congress sought to achieve when taking into account the parties' right to control the terms under which their disputes will be resolved. *See Concepcion*, 563 U.S. at 341-44, 350-52.

Whatever limitations arbitration agreements may typically impose on arbitration procedures, these agreements "are a far cry from the overtly oppressive contracts traditionally policed by courts under the doctrine of unconscionability." McGuinness & Karr, *supra*, at 90. If an agreement includes unfair limitations, they can be readily redressed through the due process protections for fairness already built into the FAA by Congress. Should a case present a highly unusual problem of unfairness that reaches constitutional due process dimensions but that is not already addressed in the FAA, then the FAA will, of course, have to give way. *See City of Boerne v. Flores*, 521 U.S. 507, 529 (1997). Constitutional due process protections trump the congressional dictates of the

FAA. And a body of due process jurisprudence exists for courts to draw upon in ascertaining whether a party has been deprived of adequate notice and an opportunity to be heard. If such a deprivation has not occurred, however, state courts may not refuse to enforce arbitration agreements under a substantive unconscionability standard predicated on subjective state policy judgments about fairness, however formulated.

III. THE SEVERABILITY RULE CALIFORNIA COURTS APPLY TO ARBITRATION AGREEMENTS IS PREEMPTED UNDER THE FAA.

Even if this Court were to limit its focus in this case to determining whether the severability principle applied by the Ninth Circuit is preempted by the FAA, it should still reverse the opinion below because California's arbitration-specific severability rule disproportionately invalidates arbitration agreements.

In *Armendariz*, 24 Cal. 4th at 124, 6 P.3d at 696-97, the California Supreme Court held that where "the arbitration agreement contains more than one unlawful provision," that inherently "indicate[s] a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." The California Supreme Court further held that, in that circumstance, a court may refuse to sever the unconscionable provisions on the ground that the entire arbitration agreement is "permeated by an unlawful purpose." *Id.*, 6 P.3d at 697.

Ever since *Armendariz*, California courts have applied this arbitration-specific severability rule in a mechanical way to disfavor arbitration agreements. *See, e.g.*, *Pinela*, 238 Cal. App. 4th at 256, 190 Cal. Rptr. 3d at 183-84 (stating severance is appropriate "where only one clause in an arbitration agreement [is] found to be substantively unconscionable," but refusing to sever where "multiple provisions" were found unconscionable); *Trivedi v. Curexo Tech. Corp.*, 189 Cal. App. 4th 387, 398, 116 Cal. Rptr. 3d 804, 812-13 (2010) (following *Armendariz* in refusing to sever multiple unconscionable provisions in arbitration agreement because that is "a circumstance considered by [the California] Supreme Court to 'permeate' the agreement with unconscionability"); *Fitz v. NCR Corp.*, 118 Cal. App. 4th 702, 726, 13 Cal. Rptr. 3d 88, 106 (2004) (refusing to sever multiple unconscionable arbitration provisions, holding "[i]n *Armendariz* the California Supreme Court held that more than one unlawful provision in an arbitration agreement weighs against severance").

By contrast, California courts have not applied any presumption against severance outside the context of arbitration agreements. Indeed, with non-arbitration contracts, "California cases take a very liberal view of severability, enforcing valid parts of an apparently indivisible contract where the interests of justice or the policy of the law would be furthered." *In re Marriage of Facter*, 212 Cal. App. 4th 967, 987, 152 Cal. Rptr. 3d 79, 95 (2013) (citation omitted); *see also Marathon Entm't, Inc. v. Blasi*, 42 Cal. 4th 974, 996-98, 174 P.3d 741, 743-44 (2008) (applying more liberal approach to sever unlawful provisions of non-

arbitration contract). The presumption in favor of severance is particularly strong where a contract (like the arbitration agreement here) contains a severability clause, which "evidence[s] the parties' intent that, to the extent possible, the valid provisions of the contracts be given effect, even if some provision is found to be invalid or unlawful." *Facter*, 212 Cal. App. 4th at 985, 152 Cal. Rptr. 3d at 94 (citation omitted).

In short, California law applies a de facto presumption *against* severance to arbitration agreements that contain multiple unconscionable provisions but a de facto presumption *in favor of* severance to non-arbitration contracts containing multiple unconscionable provisions. The California severability doctrine thus disproportionately burdens arbitration agreements and is therefore preempted by the FAA. *See Concepcion*, 563 U.S. at 341-42.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MHN GOVERNMENT SERVICES, INC.
AND MANAGED HEALTH NETWORK, INC.,

Petitioners,

v.

THOMAS ZABOROWSKI, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE EMPLOYERS GROUP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Federal Arbitration Act ("FAA") provides that an arbitration agreement shall be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. California law applies a different rule of contract severability to agreements to arbitrate. The arbitration-only rule disfavors arbitration and applies even when the agreement contains an express severability clause. Its application in this case conflicts with binding precedent of this Court and with opinions of four other courts of appeals.

The question presented is whether California's arbitration-only severability rule is preempted by the Federal Arbitration Act.

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INTEREST OF *AMICUS CURIAE*[1]

The Employers Group is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,500 California employers of all sizes in every industry, which collectively employ nearly three million employees. The Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, the Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships. It also provides online, telephonic, and in-company human resources consulting services to its members.

Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, the Employers Group is uniquely able to assess both the impact and implications of the issues presented in employment cases such as this one. The Employers Group has been involved as *amicus* in many significant employment cases before the U.S. Supreme Court, the California Supreme Court, and the U.S. Court of Appeals for the Ninth Circuit.

This case is of exceptional importance to employers in California and to the Employers Group's thou-

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[1] Pursuant to this Court's Rule 37.3(a), both parties submitted letters to the Clerk granting blanket consent to *amicus curiae* briefs. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

sands of members. For years, state and federal courts in California have issued decisions that conflict with the Federal Arbitration Act ("FAA") 9 U.S.C. § 1 *et seq.* and with this Court's jurisprudence. This case—in which the Ninth Circuit refused to apply to arbitration agreements the same liberal policy toward severance that California courts routinely apply to ordinary contracts—is only the latest manifestation of California courts' historic hostility to arbitration agreements. That hostility violates this Court's precedents and Congress's intent in enacting the FAA. The Employers Group therefore submits this brief to explain the importance of the issues presented and to urge this Court to reverse the Ninth Circuit's deeply flawed decision.

SUMMARY OF ARGUMENT

For the last several decades, California courts—including both the California Supreme Court and the Ninth Circuit—have waged a systematic campaign against arbitration. Through a series of decisions, these courts have undercut the FAA by applying purported state public policies that exist only to undo arbitration agreements. Underlying this campaign is a fundamental hostility towards arbitration that violates the FAA. Although this Court has repeatedly stepped in to defend the FAA, California courts continue to find new ways around this Court's precedents.

The decision below is symptomatic of this larger problem. Beginning with the California Supreme Court's decision in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669, 678 (Cal. 2000), California courts have applied a rule of severability that discriminates against arbitration contracts. Instead of adhering to California's longstanding prefer-

ence for severing contractual provisions that are unlawful or invalid as long as the remainder of the contract is lawful, *Armendariz* and cases following its lead hold that arbitration agreements containing two or more unlawful provisions are *per se* oppressive, and on that basis cannot be enforced. Dozens of arbitration agreements have been struck down for this reason. This disparate treatment plainly violates this Court's admonition in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), that arbitration agreements must be treated equally both in theory and practice, *id.* at 342, and makes it more difficult for parties to contract for arbitration.

California's persistent distaste for arbitration and its repeated efforts to undermine it at every turn show no sign of abating. Rather, two recent decisions—*Iskanian v. CLS Transport Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), and *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015)—confirm that California courts will continue to defy this Court's FAA preemption caselaw and the scope of the FAA's savings clause in the name of serving purported policy objectives that plainly conflict with the FAA. This Court should halt this disturbing trend by reversing the Ninth Circuit's decision.

ARGUMENT

I. CALIFORNIA COURTS HAVE REPEATEDLY SOUGHT TO UNDERMINE THE FEDERAL POLICY FAVORING ARBITRATION AGREEMENTS

In this case, the Ninth Circuit relied on California law to invalidate an arbitration agreement that, had it been an ordinary contract, would have been deemed severable and enforceable, at least in part.

This case is not an anomaly; rather, it is the latest example in an ongoing effort by California state courts, and federal courts following them, to end-run the FAA and the federal policy favoring arbitration agreements.

This Court has repeatedly stepped in to protect the FAA from the hostility of California courts. Beginning in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court reversed a California Supreme Court decision refusing to compel arbitration of certain claims which, under state law, had to be brought in state court. This Court held that such a law "directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause." *Id.* at 10.

Likewise, in *Perry v. Thomas*, 482 U.S. 483 (1987), this Court reversed a California Court of Appeal decision that refused to compel arbitration of an employee's claims under section 229 of the California Labor Code. This Court concluded that the "clear federal policy" favoring arbitration was in "unmistakable conflict with California's § 229 requirement that litigants be provided a judicial forum for resolving wage disputes" and as such, "the state statute must give way." *Id.* at 490, 491.

Fourteen years later, in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001), this Court reversed a decision by the Ninth Circuit that sought to narrow the reach of the FAA by holding that section 1, which sets forth the types of disputes that are arbitrable, exempted *all* employment contracts from arbitration, rather than merely those pertaining to certain transportation workers.

This Court intervened twice more seven years later. *See Preston v. Ferrer*, 552 U.S. 346 (2008);

Hall Street Assocs. LLC v. Mattel, Inc., 552 U.S. 576 (2008). In *Preston*, the Court reversed a California Court of Appeal decision denying a motion to compel arbitration and held that the FAA preempted state laws lodging primary jurisdiction for the dispute in another forum. 552 U.S. at 359. To hold otherwise, the Court observed, would "frustrate[]" arbitration's goal of achieving "'streamlined proceedings and expeditious results.'" *Id.* at 357–58 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)). In *Hall*, the Court reversed the Ninth Circuit for relying on the doctrine of "manifest disregard" as a ground for vacating arbitration awards, even though that phrase appears nowhere in the text of the FAA. 552 U.S. at 588–90.

Three years later, California courts again found themselves facing this Court's scrutiny in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). *Concepcion* reversed a Ninth Circuit decision affirming the denial of a motion to compel arbitration on the ground that the arbitration agreement included a class-action waiver that was unconscionable under the California Supreme Court's decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

This Court held that the *Discover Bank* rule was preempted by the FAA, reasoning that "[r]equiring the availability of classwide arbitration," as California did, while facially non-discriminatory, "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344. In particular, this Court explained that permitting classwide arbitration would eliminate any incentive for lawyers to arbitrate on behalf of individuals and for companies to resolve such claims on an individual basis. Permit-

ting classwide arbitration would also require "additional and different procedures involving higher stakes" than those the parties initially bargained for. *Id.* at 347–48. With classwide arbitration in play, the parties would be required to exchange "informality" for a "slower, more costly" and necessarily more cumbersome process in order to safeguard the rights of absent class members and the rights of defendants who might find themselves exposed to enormous liability. *Id.* at 348, 350–52.

Following *Concepcion*, this Court vacated and remanded another California case, *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011), for reconsideration. There, the California Supreme Court had held that an arbitration agreement requiring an employee to waive his right to an administrative hearing was unconscionable and that California's law requiring such a hearing to vindicate "important state interests" was not preempted by the FAA. *See Sonic-Calabasas A, Inc. v. Moreno* ("*Sonic I*"), 247 P.3d 130, 147, 151 (Cal. 2010).

Taken together, these decisions reveal an unmistakable pattern of discrimination against arbitration by California courts that denies private parties the ability to achieve quick, simple, and cost-effective resolutions of their disputes through arbitration. As the Court stated in *Concepcion*, parties "*could* agree to arbitrate" pursuant to a variety of procedures, but "[s]tates cannot *require* a procedure that is inconsistent with the FAA." 563 U.S. at 351 (second emphasis added). California courts, however, stubbornly refuse to accept this Court's repeated admonition that the FAA "requires courts to honor parties' expectations" and that state laws which "stand[] as an obstacle to the accomplishment and execution of the

full purposes and objectives of Congress" as set forth in the FAA, are preempted. *Id.* at 351, 352.

II. THE *ARMENDARIZ* RULE IS DEEPLY FLAWED AND VIOLATES THIS COURT'S PRECEDENTS AND CONGRESS'S INTENT IN ENACTING THE FAA

The Federal Arbitration Act demands that arbitration agreements be placed on "equal footing" with ordinary contracts if not "favor[ed]" over other agreements. *Concepcion*, 563 U.S. at 339 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)); *Perry*, 482 U.S. at 489. Such treatment is consistent with the "liberal federal policy favoring arbitration agreements notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). And it is consistent with this Court's precedents that "require[] courts to enforce agreements to arbitrate according to their terms." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012).

California courts purport to agree with these holdings, noting that the state maintains a "public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution." *Pearson Dental Supplies, Inc. v. Super. Ct.*, 229 P.3d 83, 94 (Cal. 2010). They also acknowledge the "strong federal policy of enforcing arbitration agreements" and the supposed parity between arbitration agreements and other contracts. *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669, 678 (Cal. 2000). But while cases like *Armendariz*—the basis for the Ninth Circuit's decision in this case—pay lip-service to these principles, they are anything but faithful to them in practice.

The anti-arbitration animosity embedded within *Armendariz*—and reflected in the Ninth Circuit's decision here—reveals itself on multiple levels.

1. Although this Court has declared that "a state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [section] 2" of the FAA, *Perry*, 482 U.S. at 492 n.2, California courts nevertheless have adopted the view that certain principles, including unconscionability, "may manifest themselves in forms peculiar to the arbitration context." *Armendariz*, 6 P.3d at 693. The "peculiar" form in which such unconscionability appears is in a "lack[] [of] mutuality." *Id.* For years, a "lack of mutuality" was "the most common means employed by the [California] Courts of Appeal to void arbitration agreements." Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 54 (2006); *see also id.* at 45–48 (conducting empirical study and concluding that California courts struck down arbitration agreements on the grounds of unconscionability in 53 out of 114 cases, but struck down ordinary contracts on these grounds in only 5 out of 46 cases). Indeed, this Court recently observed that "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts," usually on this basis. *Concepcion*, 563 U.S. at 342.

A lack of mutuality is not the only basis for invalidating arbitration agreements. California courts have also declared arbitration agreements procedurally unconscionable even where the plaintiff had an opportunity to decline the defendant's contract and enter into a contract stripped of the offending term.

See, e.g., *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Ct. App. 2002). They have also done so where the contract was not otherwise presented on a "take it or leave it" basis. *Pardee Constr. Co. v. Super. Ct.*, 123 Cal. Rptr. 2d 288, 283 (Ct. App. 2002) (noting that "[i]n any event, even if the parties' agreements were deemed not to be adhesive, plaintiffs have established the judicial reference provisions of those agreements were unconscionable at the time such agreements were made").

Likewise, other restrictions typical of arbitration agreements, such as those relating to the types of remedies and claims available, the availability of appeals, limits on the statute of limitations, and the place and manner of arbitration have all been held to be unconscionable. *See, e.g.*, *Harper v. Ultimo*, 7 Cal. Rptr. 3d 418, 421 (Ct. App. 2003) (limitations on remedies); *Fittante v. Palm Springs Motors Inc.*, 129 Cal. Rptr. 2d 659, 722 (Ct. App. 2003) (appeals); *Martinez v. Master Prot. Corp.*, 12 Cal. Rptr. 3d 663, 670–71 (Ct. App. 2004) (statute of limitations); *Bolter v. Super. Ct.*, 104 Cal. Rptr. 2d 888, 896 (Ct. App. 2001) (place of arbitration). Even provisions incorporating the mutual and established rules of the American Arbitration Association, which direct the parties to share the cost of arbitration unless otherwise required by statute or by agreement, have been declared unconscionable. *See O'Hare v. Mun. Res. Consultants*, 132 Cal. Rptr. 2d 116, 125–26 (Ct. App. 2003). Yet these provisions are lightyears away from the "shock-the-conscience" provisions that might render an ordinary contract unconscionable.

Despite this Court's repeated warnings, the California Supreme Court has made clear that it will continue to invoke the doctrine of unconscionability

to justify its practice of discriminating against arbitration agreements. For example, on remand from *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011), the California Supreme Court doubled-down on the unconscionability exception to enforcing arbitration agreements, once again using public policy as the purported hook for invalidating such agreements. *Sonic-Calabasas A, Inc. v. Moreno* ("*Sonic II*"), 311 P.3d 184, 199, 201–03 (Cal. 2013).

Specifically, in *Sonic II*, the California Supreme Court gave California courts a roadmap for using the unconscionability doctrine to invalidate arbitration agreements that could be "unfairly one-sided." 311 P.3d at 202. The court explained that while a state public-policy defense to arbitration would be FAA-preempted, an unconscionability defense to arbitration would not be. The solution, therefore, is for courts to infuse considerations of (anti-arbitration) public policy into their unconscionability analysis. *See Sonic II*, 311 P.3d at 202 (noting that the unconscionability doctrine may be applied to terms that "otherwise contravene the public interest or public policy").

The California Supreme Court's most recent decision in this area, *Sanchez v. Valencia Holding Co.*, 353 P.3d 741 (Cal. 2015), reaffirms that doctrines of unconscionability and public policy may continue to be used to invalidate arbitration agreements. "*Concepcion*," the court emphasized, "does not immunize arbitration processes from state law unconscionability principles." *Id.* at 750. As if oblivious to the current treatment of arbitration agreements, the court then warned that such principles would be "as rigorous and demanding for arbitration clauses as for any contract clause." *Id.* at 749.

Justice Chin, in dissent, took issue with the majority's decision to maintain California's various unconscionability formulations while also declaring that they "all mean the same thing." 353 P.3d at 749; *id.* at 766 (Chin, J., dissenting). "Having multiple formulations," he wrote, "lends substantial credence to the 'loud chorus of courts and commentators' who assert that, contrary to the [U.S. Supreme Court's] decisions, we are using unconscionability 'as a ruse for a "new judicial hostility" to arbitration.'" *Id.* at 767 (quoting Aragaki, *AT&T Mobility v. Concepcion and the Antidiscrimination Theory of FAA Preemption*, 4 Y.B. Arb. & Mediation 39, 60 (2012–2013)).

2. As Justice Chin's dissent in *Sanchez* suggests, the anti-arbitration animus underlying the "lack of mutuality" standard, the unconscionability doctrines, and the heightened scrutiny they generate is hardly a secret: according to *Armendariz*, "even a fair arbitration system" is filled with "disadvantages" and a "lack of choice" for employees, such that courts "must be particularly attuned to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement." 6 P.3d at 690, 692.

Consistent with that underlying suspicion of arbitration, *Armendariz* also applies an arbitration-specific standard of severability that permits California courts to invalidate arbitration agreements while saving ordinary agreements by applying the traditional severability doctrine.

Animated by an inherent bias against arbitration, *Armendariz* restates the facially neutral contract interpretation principle that a court may "refuse to enforce the contract as a whole if it is perme-

ated by ... unconscionability," 6 P.3d at 695, but then creates a special rule for arbitration agreements: They are "permeated" by unconscionability, and therefore, incapable of severance, where they have "more than one unlawful provision." *Id.* at 696–97. Under *Armendariz*, multiple unlawful provisions purportedly "indicate a systematic effort" to promote an "unlawful purpose"; namely, "to impose arbitration on an employee not simply as an alternative to litigation, but as *an inferior forum* that works to the employee's disadvantage." *Id.* (emphasis added).

This flawed logic conflates the desirability of severance with its feasibility. Instead of examining the interplay between the relevant contractual provisions and asking whether the arbitration agreement is *capable* of being enforced (as California courts do with ordinary contracts, *see, e.g., Marathon Entm't v. Blasi*, 174 P.3d 741, 751 (Cal. 2008)), the *Armendariz* rule allows a court to ask whether a given arbitration agreement *should* be enforced. And it permits the court to answer in the negative for just about any reason.

The *Armendariz* rule flies in the face of this Court's repeated admonition that courts may not "'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.'" *Concepcion*, 563 U.S. at 341 (quoting *Perry*, 482 U.S. at 493 n. 9). This warning has gone largely unheeded in California: California courts apply *Armendariz*'s "two-strikes-you're-out" rule to arbitration agreements when they would not do so to ordinary agreements, as to which there is supposedly a "strong legislative and judicial preference [of] sever[ing] [an] offending term and enforc[ing] the balance of the agreement." *Roman v.*

Superior Court, 92 Cal. Rptr. 1462, 1477–78 (Ct. App. 2009).

The traditional severability rule, which flows from section 1599 of the Civil Code, is quite different. It provides that "[w]here a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." Under this rule, California courts typically treat ordinary agreements with deference, enforcing those agreements regardless of how many unenforceable provisions they contain or how indivisible they are. In *Marathon Entertainment*, a case involving an actor and a talent agency, the California Supreme Court rejected the plaintiff's argument that an entire agreement for the procurement of employment should be voided because it had been pervaded by "illegal" provisions and would undermine certain statutes governing the relationship between actors and talent agencies. 174 P.3d at 775. The Court did not take the "two-strikes" route here: instead, citing the traditional severability rule set forth in section 1599, it dutifully examined the lawful portions of the contract and determined that they "feasibly may be severed." *Id.* at 751.

Marathon is not an isolated example: In *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 13 (Cal. 1998), the California Supreme Court once again applied the traditional severability rule to sever offending provisions instead of invalidating the contract in its entirety. In *Birbrower*, a client sued its law firm for breach of the parties' fee agreement for legal services performed in New York and California because the firm had performed legal work in California without a li-

cense. *Id.* at 4. The California Supreme Court agreed that the firm had engaged in the unauthorized practice of law in California and that the parties' fee agreement "became illegal" when it did so, but nevertheless upheld the portion of the agreement permitting fees for the work lawfully performed in New York. *Id.* at 12–13.

Likewise, in *MKB Management Inc. v. Melikian*, 108 Cal. Rptr. 3d 899, 903 (Ct. App. 2010), the California Court of Appeal reversed the trial court's ruling that a property management agreement providing for multiple services was unenforceable because its "principal object" was for the defendant, who had no real estate license, to provide services for which a real estate license was required. The trial court, which had applied *Armendariz*-like reasoning, had stated that severance of the provisions relating to services for which the license was required would be impossible because it would "undermine the real estate licensing statutes." *Id.* at 906. But the Court of Appeal disagreed with that premise and did not apply anything resembling the *Armendariz* "two-strikes" rule. Instead, it declared that it could not conclude "as a matter of law ... that all of the services provided under the property management agreement were dependent upon or inextricably related to the acts for which a real estate broker license was required" and declined to invalidate the entire agreement. *Id.*

Yet California courts deviate from the traditional severability rule when asked to enforce an arbitration agreement. Instead of examining the lawful portions of the agreement and analyzing whether severability is feasible, courts follow an arbitration-specific severability rule and focus almost exclusively

on whether the agreement contains more than one unenforceable provision. In *Carmona v. Lincoln Millennium Car Wash, Inc.*, 171 Cal. Rptr. 3d 42, 55 (Ct. App. 2014), for example, the California Court of Appeal affirmed an order refusing to sever a single "enforceability" clause from an arbitration agreement because the clause contained four unconscionable provisions demonstrating a "systemic lack of mutuality," even though the contract easily could have been reformed to exclude those "systemic" provisions. *Id.* The court did not examine the remainder of the contract to determine whether anything within it could be enforced. Likewise, in *Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492, 501 (Ct. App. 2012), the Court of Appeal affirmed the trial court's refusal to enforce an arbitration agreement with "multiple defects" without any discussion whatsoever of the lawful portions of the contract.

Parada v. Superior Court, 98 Cal. Rptr. 3d 743, 770 (Ct. App. 2009), applied the same mode of analysis. There, the California Court of Appeal reversed an order compelling arbitration. It invalidated the arbitration agreement not merely because it had more than one offending provision, but because the defendant had supposedly included the offending provisions "deliberately" and for an "improper purpose of discouraging or preventing its customers from vindicating their rights." *Id.*

These are not unique examples. Since the California Supreme Court decided *Armendariz* in 2000, California state courts have used its "permeated" language to invalidate more than 17 arbitration agreements in published decisions, without applying the traditional severability analysis that is used for

other contracts.[2] Only two cases in that set even *mention* the traditional rule set forth in section 1599, and the ones that do mention it fail to apply it.

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[2] *See, e.g.*, *Pinela v. Neiman Marcus Grp., Inc.*, 190 Cal. Rptr. 3d 159, 183–84 (Ct. App. 2015) (invalidating arbitration agreement containing three unconscionable provisions); *Carmona v. Lincoln Millennium Car Wash, Inc.*, 171 Cal. Rptr. 3d 42, 55 (Ct. App. 2014) (four unconscionable provisions); *Ajamian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773, 799 (Ct. App. 2012) (two unconscionable provisions); *Wherry v. Award, Inc.*, 123 Cal. Rptr. 3d 1, 7–8 (Ct. App. 2011) (three unconscionable provisions); *Lhotka v. Geographic Expeditions*, 104 Cal. Rptr. 3d 844, 852–53 (Ct. App. 2010) (two unconscionable provisions and two provisions that "compounded" the unfairness); *Suh v. Super. Ct.*, 105 Cal. Rptr. 3d 585, 596–97 (Ct. App. 2010) (one unconscionable provision (limiting remedies)); *Trivedi v. Curexo Tech. Corp.*, 116 Cal. Rptr. 3d 804, 813 (Ct. App. 2010) (two unconscionable provisions); *Sanchez v. Western Pizza Enters.*, 90 Cal. Rptr. 3d 818, 838–39 (Ct. App. 2009) (two unconscionable provisions, including class-action waiver); *Ontiveros v. DHL Express. (USA) Inc.*, 79 Cal. Rptr. 3d 471, 488 (Ct. App. 2008) (three unconscionable provisions); *Abramson v. Juniper Networks*, 9 Cal. Rptr. 3d 422, 444–45 (Ct. App. 2004) (two unconscionable provisions); *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 106 (Ct. App. 2004) (two unconscionable provisions); *Martinez v. Master Protection Corp.*, 12 Cal. Rptr. 3d 663, 673 (Ct. App. 2004) (three unconscionable provisions); *Nyulassy v. Lockheed Martin Corp.*, 16 Cal. Rptr. 3d 296, 311–12 (Ct. App. 2004) (two unconscionable provisions); *O'Hare v. Mun. Res. Consultants*, 132 Cal. Rptr. 2d 116, 121, 125, 129 (Ct. App. 2003) (two unconscionable provisions); *Mercuro v. Super. Ct.*, 116 Cal. Rptr. 2d 671, 683–84 (Ct. App. 2002) (three unconscionable provisions); *Flores v. Transamerica HomeFirst, Inc.*, 113 Cal. Rptr. 2d 376, 385 (Ct. App. 2001) (lack of bilaterality tainted at least two provisions); *Pinedo v. Premium Tobacco Stores*, 102 Cal. Rptr. 2d 435, 440 (Ct. App. 2000) (four unconscionable provisions).

Abramson v. Juniper Networks, 9 Cal. Rptr. 3d 422, 444–45 (Ct. App. 2004); *Sanchez v. Western Pizza Enters.*, 90 Cal. Rptr. 3d 818, 838–39 (Ct. App. 2009). And the Ninth Circuit, applying California law, has done the same on several other occasions. *See, e.g.*, *Ingle v. Circuit City Stores*, 328 F.3d 1165, 1180 (9th Cir. 2003) (six provisions combined to "stack the deck unconscionably" in favor of the defendant); *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778, 787 (9th Cir. 2002) (three unconscionable provisions). That asymmetric treatment suggests not merely an improper exercise of judicial discretion, but a systematic effort to disfavor arbitration agreements relative to other contracts. This double standard could not conflict more with the purpose of the FAA, which was to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 302 (2010).

III. This Court Should Reverse The Ninth Circuit's Decision And Enforce The FAA's Command To Respect The Contractual Expectations Of The Parties

California courts' discrimination against arbitration agreements based on the belief that arbitration by its nature is inferior to litigation has persisted despite this Court's numerous attempts to prevent and correct it.

Two recent cases are illustrative. In *Iskanian v. CLS Transport Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), and *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), the California Supreme Court and the Ninth Circuit invoked California law in refusing to enforce provisions in arbitration agreements that would have required an em-

ployee to waive the right to bring a representative action under the Private Attorneys General Act (PAGA). In both cases, the courts reasoned that the FAA did not permit private parties to circumvent California's efforts to enforce its Labor Code by agreeing to waive PAGA actions in arbitration. *See Iskanian*, 327 P.3d at 149 (observing that allowing employees to waive the right to bring PAGA actions would "disable one of the primary mechanisms for enforcing the Labor Code" and would undermine statutes providing that laws established for a public purpose may not be contravened by a private agreement); *Sakkab*, 803 F.3d at 439 (noting that the court's conclusion that "the FAA does not preempt the *Iskanian* rule is bolstered by the PAGA's central role in enforcing California's labor laws").

The logic of *Iskanian* and *Sakkab* cannot be reconciled with this Court's clear holding in *Concepcion* that states "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 563 U.S. at 341; *see also Sakkab*, 803 F.3d at 449 (N.R. Smith, J., dissenting) ("[I]f a state law violates or frustrates the FAA, the state law must give way, even if such a decision prevents the state's interest from being vindicated."). Nor can their logic be reconciled with this Court's subsequent holding in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2312 (2013), that policy interests behind particular legislation do not override Congress's desire for arbitration agreements to be enforced.

The *Iskanian* rule, like the now-defunct rule set forth in *Discovery Bank v. Superior Court*, 113 P.3d 1110 (Cal. 2005), *overruled by Concepcion*, 563 U.S. 333, interferes with the parties' contractual expecta-

tions and deprives them of the benefits of arbitration by making arbitration "more costly," "slower," and more prone to generate a "procedural morass." 803 F.3d at 445 (N.R. Smith, J., dissenting) (citing *Concepcion*, 563 U.S. at 348); *see also Concepcion*, 563 U.S. at 349–50 (adding that class-action waivers may be desirable to protect the rights of absent class members and to reduce the financial risk to defendants).

The *Sakkab* majority defended the *Iskanian* rule by reasoning that the parties could theoretically agree to procedures to simplify the arbitration of the representative PAGA claims or could agree to arbitrate high-stakes issues posing greater financial risk to defendants. *See* 803 F.3d at 437–38. But that defense of *Iskanian* ignores that the FAA's overriding purpose is to ensure that *the parties* are empowered to make those decisions, not a court bent on achieving policy objectives. *See id.* at 448 ("Parties to an arbitration *could agree* to arbitrate high stakes issues. However, a state court cannot 'force such a decision.'").

* * *

As this Court stated nearly three decades ago in *Perry*, courts may not use "the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot." 482 U.S. at 492 n. 9. Cognizant that the FAA *should* preempt state laws that are inconsistent with the goals of arbitration (such as PAGA), *Iskanian*, *Sakkab*, and the instant case circumvent that obstacle by disguising those same policy objections as "neutral" state-law unconscionability principles, and proceeding to apply those principles

unequally to arbitration agreements just as the California Supreme Court did in *Armendariz*.

All three cases thus reflect the same embedded animus against arbitration, and engage in the same kind of judicial second-guessing that the FAA was enacted to eradicate. *See Granite Rock*, 561 U.S. at 302. On the whole—particularly in light of the long history of other California decisions undermining the FAA at every turn—the anti-arbitration prejudices that these cases display demonstrate the urgent need for this Court to reverse the Ninth Circuit's decision in this case and put an end to California's discrimination against arbitration once and for all.

CONCLUSION

For the reasons stated above and in Petitioners' brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

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Petitioners,

v.

THOMAS ZABOROWSKI, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* in support of Petitioners and of reversal.[1]

[1] All parties have consented to the filing of this brief. Counsel for *amicus curiae* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements.

EEAC's member companies are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment nondiscrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using a variety of tools, including arbitration and other forms of Alternative Dispute Resolution (ADR). Many of them have adopted company-wide policies requiring the use of binding arbitration to resolve all employment-related disputes. EEAC thus has a direct and ongoing interest in the issues presented in this case regarding the application of arbitration-specific rules which effectively preclude the use of binding, pre-dispute arbitration by any employer with a business presence in California.

The court below, relying on the California Supreme Court's decision in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000), improperly refused to enforce Respondents' arbitration

agreement because it contained more than one purportedly unconscionable provision and thus was presumed to have been adopted as a means of depriving Petitioners of their statutory rights. Given a choice between severing the offending clauses pursuant to the agreement's severability provision and invalidating the agreement as a whole, the court below elected the latter, and in doing so acted in contravention of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, as interpreted repeatedly by this Court.

Because of its interest in this subject, EEAC has filed *amicus curiae* briefs supporting the enforceability of arbitration agreements in numerous cases before this Court, including *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000), *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 1047 (2009); *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 559 U.S. 662 (2010); *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *CarMax Auto Superstores Cal., LLC v. Fowler*, 134 S. Ct. 1277 (2014); and *DIRECTV, Inc. v. Imburgia*, No. 14-462 (U.S. June 5, 2015) (Brief *Amicus Curiae* of the Equal Employment Advisory Council in Support of Petitioner). EEAC is thus deeply familiar with the issues presented in this case and is well-situated to brief the Court on the significant importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioners MHN Government Services, Inc. and Managed Health Network (MHN) provide nonmedical financial and other counseling services at U.S. military installations abroad. Pet. App. 12a. Respondents were consultants whom MHN engaged to provide those services. Pet. App. 12a-13a. They each signed an independent contractor agreement that contained a binding arbitration provision, as well as a severability clause providing that "[i]n the event that any provision of this Agreement is rendered invalid or unenforceable ... the remaining provisions of this Agreement shall remain in full force and effect." Pet. App. 53a.

Respondents filed a putative class action in federal court for wage and hour violations. Pet. App. 13a. MHN moved to compel arbitration pursuant to the binding arbitration contract clause. *Id.* The trial court, applying the California Supreme Court's 2000 decision in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000), found several parts of the mandatory arbitration provision to be substantively and procedurally unconscionable, so much so that it refused to apply the severability language and instead invalidated the entire provision. Pet. App. 16a-28a.

On MHN's appeal, the Ninth Circuit affirmed 2-1, relying on *Armendariz* and its progeny, *see, e.g.*, *Samaniego v. Empire Today, LLC,* 140 Cal. Rptr. 3d 492 (Cal. Ct. App. 2012), as construed in *Chavarria v. Ralph's Grocery Co.*, 733 F.3d 916 (9th Cir. 2013) – which held that the *Armendariz* arbitration-only severability rule was not "impermissibly unfavorable to arbitration." Pet. App. 2a-6a. Judge Gould dissented, arguing that the *Armendariz* rule is, in fact,

incompatible with the Supreme Court's decision in *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), and therefore is invalid. Pet. App. 7a-11a (Gould, J., dissenting). After its petition for rehearing *en banc* was denied, MHN filed a petition for a writ of certiorari, which this Court granted on October 1, 2015.

SUMMARY OF ARGUMENT

Time and again, this Court has emphasized that a principal aim of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, is to construe private arbitration agreements in accordance with the parties' desires and expectations. "[T]he FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). To the contrary, courts are to "rigorously enforce agreements to arbitrate . . . in order to give effect to the contractual rights and expectations of the parties." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458 (2003) (citations and internal quotations omitted).

In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011), this Court held that states may not enforce rules that place burdens on arbitration agreements that do not exist for other types of contracts. The decision below does just that, endorsing a rule that holds private employment arbitration agreements to a higher standard of enforceability than is generally applicable to other private contracts, in direct contravention of the FAA. This Court has held that such a state law, whether statutorily or judicially created, is incompatible with, and therefore is preempted by, the FAA. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

Disregarding the principles established by this Court in *Concepcion*, the court below instead relied on a California state rule of law, which in its application if not design disfavors employment arbitration agreements over contracts generally. *See Armendariz v. Found. Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000). In *Armendariz*, the California Supreme Court established special rules of unconscionability and severability that apply uniquely to employment arbitration agreements. As to the former, *Armendariz* effectively establishes a presumption of unconscionability where an arbitration agreement contains provisions that reflect, for instance, a lack of bargaining parity between the employer and employee.

As to the latter, *Armendariz* provides that where more than one purportedly unconscionable provision is present, severance of the offending provisions is inappropriate, because "[s]uch multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." 6 P.3d at 697. This arbitration-only severability rule increases substantially the likelihood that the agreement to arbitrate will not be enforced at all. Such a rule is incompatible with the FAA and this Court's longstanding FAA jurisprudence, including most notably *Concepcion*.

At its core, the California policy expressed in the decision below reflects the state courts' persistent hostility to employment arbitration, which runs counter to the strong federal policy favoring it as an effective and efficient means of resolving private disputes. The *Armendariz* doctrine thus creates a chilling effect on employers' efforts to establish binding arbitration programs, making it extremely

difficult to effectuate the aims and practical benefits underlying employment arbitration. The failure to enforce arbitration agreements in California means that employers and employees will be deprived of the many well-established benefits afforded by an arbitral forum, including "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes," *Concepcion*, 563 U.S. at 348, and forced instead into a severely overburdened court system. The problem is especially acute for employers, which face significantly greater odds of having to defend more, and lengthier, employment claims and lawsuits in California than in most other states.

ARGUMENT

I. AS APPLIED BY THE COURT BELOW, CALIFORNIA'S *ARMENDARIZ* DOCTRINE – INCLUDING ITS ARBITRATION-ONLY SEVERABILITY RULE – IS INCOMPATIBLE WITH, AND THEREFORE IS PREEMPTED BY, THE FAA

This Court repeatedly has reaffirmed the strong public policy expressed in the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, favoring the arbitration of private employment disputes. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). Disregarding that fundamental principle, the court below, applying the arbitration-specific enforceability doctrine established by the California Supreme Court in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000), invalidated as unconscionable several provisions contained in an arbitration agreement signed by Respondents in connection with their employment with Petitioners.

Despite the existence of an express severability clause, the court refused to enforce the remaining provisions and compel individual arbitration out of a policy concern that enforcement of an agreement containing multiple defects would "license a party with superior bargaining power 'to stack the deck unconscionably in [its] favor' when drafting [its] terms ...." Pet. App. 5a.

In doing so, the court embraced the *Armendariz* doctrine, which in its application (if not design) subjects agreements to arbitrate to unique burdens inapplicable to contracts generally, in direct contravention of the FAA. Inasmuch as the decision below rests on an analysis that is squarely foreclosed by the FAA, it is erroneous and should be reversed.

A. California's *Armendariz* Doctrine Disfavors Arbitration Agreements In Direct Contravention Of The FAA As Interpreted By This Court In *Concepcion*

1. The FAA establishes a strong presumption in favor of arbitration

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, "was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The Act "declares as a matter of federal law that arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989) (quoting 9 U.S.C. § 2). Accordingly, only generally applicable contract defenses, such as fraud, duress, or unconscionability, can be used to invalidate an arbitration agreement. The

FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (superseded by statute on other grounds) (footnote omitted).

Section 2 of the FAA is the "primary substantive provision of the Act." *Id.* at 24. This section has been described as "reflecting both a 'liberal federal policy favoring arbitration,'" *Concepcion*, 563 U.S. at 339 (citation omitted), and the "'fundamental principle that arbitration is a matter of contract.'" *Id.* (citation omitted); *see also Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). "Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343 (citations omitted).

Indeed, "'[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [courts] rigorously enforce agreements to arbitrate.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). Thus, "[b]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as

to which an arbitration agreement has been signed." *Dean Witter Reynolds*, 470 U.S. at 218 (citations omitted).

2. The *Armendariz* unconscionability test is not a generally applicable contract defense within the meaning of the FAA

Due in large measure to the California Supreme Court's decision in *Armendariz*, and in persistent disregard of the FAA's pro-arbitration purposes and aims, "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *Concepcion*, 563 U.S. at 342. In *Armendariz*, the court invalidated an arbitration agreement that would have required the plaintiffs to arbitrate their statutory discrimination claims rather than commence a civil action in a judicial forum. 6 P.3d at 674. It began by acknowledging that in *Gilmer v. Interstate/Johnson Lane Corp.*, this Court held that statutory age discrimination claims may be subject to binding arbitration, noting "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." 500 U.S. 20, 26 (1991) (citation omitted).

Consistent with that principle, the California court conceded that only generally applicable defenses, such as unconscionability, may serve as "valid reason for refusing to enforce an arbitration agreement." *Armendariz*, 6 P.3d at 689. Concerned that "ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context ... [such as] an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party," 6 P.3d at 693,

however, the court went on to craft a *special* rule of unconscionability to be applied to arbitration agreements, under which an employer must present a "reasonable justification" for imposing binding arbitration. 6 P.3d at 692. "Without such justification," the court said, the agreement is assumed to be unconscionable. 6 P.3d at 694. The court nevertheless denied that the rule would "disfavor arbitration," 6 P.3d at 693, insisting:

> It is no disparagement to arbitration to acknowledge that it has, as noted, both advantages and disadvantages. The perceived advantages of the judicial forum for plaintiffs include the availability of discovery and the fact that courts and juries are viewed as more likely to adhere to the law and less likely than arbitrators to "split the difference" between the two sides, thereby lowering damages awards for plaintiffs.

Id.

The court explained that unconscionability contains both a procedural and a substantive component, "the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." 6 P.3d at 690 (citation omitted). Concluding that the agreement was both procedurally and substantively unconscionable, it refused to sever the offending clauses for two reasons:

> First, the arbitration agreement contains more than one unlawful provision; it has both an unlawful damages provision and an unconscionably unilateral arbitration clause. *Such multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum*

> *that works to the employer's advantage.* Second, in the case of the agreement's lack of mutuality, such permeation is indicated by the fact that there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement.

Armendariz, 6 P.3d at 696 (emphasis added).

The California Supreme Court reinforced that view in *Little v. Auto Stiegler, Inc.*, suggesting that "although the *Armendariz* requirements specifically concern arbitration agreements, they do not do so out of a generalized mistrust of arbitration per se ... , but from a recognition that *some* arbitration agreements and proceedings may harbor terms, conditions and practices that undermine the vindication of unwaivable rights." 29 Cal.4th 1064, 1079 (Cal. 2003). "The *Armendariz* requirements are therefore applications of general state law contract principles regarding the unwaivability of public rights to the *unique* context of arbitration, and accordingly are not preempted by the FAA." *Id.* (emphasis added).

That contention is belied by the fact that application of the *Armendariz* doctrine results in arbitration agreements being invalidated at disproportionately higher rates than other types of contracts. Indeed, the special unconscionability test, coupled with the "multiple defects" severability rule, all but assures that most standard arbitration agreements will not survive review. As Judge Gould observed in dissenting from the decision below, "The reasoning in *Armendariz* that multiple unconscionable provisions will render an arbitration agreement's purpose unlawful has 'a disproportionate impact on arbitration agreements ....'" Pet. App. 8a (Gould, J., dissenting).

For that reason, it is contrary to, and preempted by, the FAA.

3. As applied, the *Armendariz* severability rule precludes far more than it facilitates employment arbitration

Severance respects the parties' desire to resolve their disputes without resort to costly, often complex, and time-consuming litigation, while at the same time ensuring that the agreement as a whole comports with basic fairness and due process protocols. Relying on the *Armendariz* doctrine, the court below invalidated an arbitration provision contained in an employment agreement on the belief that (1) Respondents were not given a "meaningful opportunity to negotiate" its terms, rendering it procedurally unconscionable, and (2) "multiple aspects" of the provision – including the arbitrator-selection, sixth-month limitations period, cost and fee shifting, and the filing fee and punitive damages waiver clauses – were substantively unconscionable. Pet. App. 3a-4a. Although the agreement contained an express severability clause, the court – relying again on *Armendariz* – declined to sever the offending provisions, rejecting Petitioners' compelling argument that such an interpretation is plainly foreclosed by this Court's holding and rationale in *Concepcion*, which make clear that state rules disfavoring arbitration are inconsistent with the FAA.

At issue in *Concepcion* was whether the special rule set out by the California Supreme Court in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), *abrogated by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), governing enforcement of consumer arbitration agreements containing class waiver provisions was consistent with the FAA. Concluding that it was not, this Court held that by "[r]equiring the

availability of classwide arbitration," 563 U.S. at 344, California's *Discover Bank* rule "creates a scheme inconsistent with the FAA," *id.*, because it "interferes with fundamental attributes of arbitration." *Id.* "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Id.*

Inasmuch as the lower court's rationale here rests on a state court ruling that effectively precludes arbitration of employment disputes where the agreement was contained in an adhesion contract (purportedly evidencing procedural unconscionability) and contains, among others, a clause reserving the employer's right to bring a specific subset of claims directly in court (purportedly evidencing "substantive" unconscionability), it suffers from the same fundamental defect that this Court addressed in *Concepcion*: it "interferes with fundamental attributes of arbitration [in the employment context] and thus creates a scheme inconsistent with the FAA." 563 U.S. at 344. In fact, *Concepcion* "should create a presumption in favor of severance when an arbitration agreement contains a relatively small number of unconscionable provisions that can be meaningfully severed and after severing the unconscionable provisions, the arbitration agreement can still be enforced." Pet. App. 8a (Gould, J., dissenting).

Like the *Discover Bank* rule invalidated in *Concepcion*, the *Armendariz* doctrine at the core of the decision below is contrary to the FAA and impermissibly conflicts with *Concepcion*. Therefore, the decision below should be reversed.

B. *Armendariz* Reinforces The Long-Discredited Notion That Arbitration Is An Inferior Forum For The Resolution Of Private Disputes

Despite it being a legitimate and effective (if not arguably superior) means of resolving private employment disputes, California courts continue to exhibit a deep skepticism of (if not outright hostility towards) bilateral arbitration.

> Today, courts in California translate their judicial hostility into seemingly innocuous pronouncements of 'unconscionability'... Beginning with the California Supreme Court's decision in *Armendariz* ... (and perhaps before), California courts—and the Ninth Circuit—have taken the FAA's 'savings clause' where no court has gone before.

Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration* Act, 2005 J. Disp. Resol. 61, 61-62 (2005) (footnote omitted).

Indeed, *Armendariz* remains a particularly potent means of invalidating arbitration agreements in California, despite its "dubious validity from a preemption standpoint." E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 Harv. Negot. L. Rev. 1, 5 (2015) (footnote omitted). In *Martinez v. Master Protection Corp.*, for instance, the California Court of Appeal relied on *Armendariz* to find that a handful of discrete provisions contained in a standard employment arbitration agreement were

substantively and procedurally unconscionable, thereby rendering the agreement unenforceable. 12 Cal. Rptr. 3d 663, 673 (Cal. Ct. App. 2004).

There, one of the purportedly offending provisions expressly exempted certain claims from arbitration, including those by current or former employees for workers' compensation or unemployment benefits, as well as any "claims by the Company for injunctive and/or other equitable relief for unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information, as to which ... the Company may seek and obtain relief from a court of competent jurisdiction." *Id.* at 667 n.1. Applying *Armendariz's* unconscionability rule, the court found the carve-back provision – which permitted both the employer *and* the employee to bring certain claims in court – to be substantively unconscionable because it would require "employees to arbitrate the claims they are most likely to assert," *id.* at 670, against the employer – such as statutory discrimination claims – "while simultaneously permitting [the employer] to litigate in court the claims it is most likely to assert against its employees[, namely] claims involving trade secrets, misuse or disclosure of confidential information, and unfair competition." *Id.* Then, applying *Armendariz's* severability rule, the court refused to sever the offending provisions so as to allow the parties to arbitrate the claim, finding the agreement as a whole to be "permeated with illegality and unconscionability." *Id.* at 673.

More recently in *Carmona v. Lincoln Millennium Car Wash, Inc.*, 226 Cal. App. 4th 74 (Cal. Ct. App. 2014), the California Court of Appeal, citing *Armendariz*, refused to enforce an employment arbitration agreement containing a similar carve-out for

claims arising from a breach of the agreement's business records and trade secrets confidentiality clause. In doing so, the court plainly failed to appreciate the immediate and irreparable harm that could befall the employer were an employee to breach the confidentiality clause, disdainfully characterizing the nature of information sought to be protected merely to include "things as mundane as pay rates and performance evaluations." *Carmona*, 226 Cal. App. 4th at 86.

In *Sonic-Calabasas A, Inc. v. Moreno*, ("*Sonic II*"), 311 P.3d 184 (Cal. 2013), the California high court had an opportunity, but declined, to conform its anti-arbitration *Armendariz* doctrine to this Court's pronouncements in *Concepcion*. In *Sonic-Calabasas A, Inc., v. Moreno*, ("*Sonic I*"), the court refused to compel individual arbitration of the plaintiff's state wage claims, concluding that doing so would deprive the plaintiff of his right to invoke a special, statutorily-created wage dispute resolution mechanism referred to as the "'Berman' hearing." 247 P.3d 130, 133 (Cal. 2011). This Court subsequently granted the employer's petition for a writ of certiorari, vacated the judgment, and remanded the case for reconsideration in light of *Concepcion*. *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011).

On remand, the California Supreme Court held, as it must, that "the FAA preempts *Sonic I's* rule requiring arbitration of wage disputes to be preceded by a Berman hearing ...." *Sonic-Calabasas A, Inc. v. Moreno*, ("*Sonic II*"), 311 P.3d 184, 205 (Cal. 2013). It nevertheless refused to compel arbitration, concluding that further fact-finding was required regarding whether the agreement was unconscionable and thus unenforceable on that ground. *Id.* at 207.

Dissenting, Associate Justice Chin "disagree[d] with the majority that, so long as states and their courts do not interfere with fundamental attributes of arbitration, *Concepcion* allows them to invalidate arbitration agreements as unconscionable based on a policy judgment that the arbitration procedure is not adequately affordable and accessible." *Id.* at 233 (Chin, J., concurring and dissenting). To the contrary:

> [U]nder the FAA, a state court may not, based on principles of unconscionability, refuse to enforce an arbitration agreement according to its terms simply because the arbitration procedure lacks features the Legislature, as a matter of policy, established for "a particular class" – employees – to "mitigate the risks and costs of pursuing" wage claims or to make recovery of wages owed more "accessible, informal, and affordable." In enacting the FAA, Congress "intended to foreclose [such] legislative attempts to undercut the enforceability of arbitration agreements."

Id. at 234 (Chin, J., concurring and dissenting) (citations omitted).

Simply put, "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. Our cases hold that the FAA forecloses precisely this type of 'judicial hostility towards arbitration.'" *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*) (citations omitted). Because *Armendariz*, as reaffirmed by the court below, reflects the California courts' persistent, irrational hostility towards employment arbitration despite the FAA's clear command to enforce employment arbitration

agreements as written, it is erroneous and should be overruled by this Court.

II. *ARMENDARIZ* CALLS INTO QUESTION THE LONG-TERM VIABILITY OF EMPLOYMENT ARBITRATION PROGRAMS

A. In Both Its Design And Application, The *Armendariz* Doctrine Serves As A Disincentive To Implementing Employment Arbitration Programs, Which Disadvantages Employers And Employees Alike

California's *Armendariz* rule in essence establishes a special exception to the enforcement of employment arbitration agreements based on a deep-seated mistrust of arbitration as an effective means of resolving disputes. At best, it places such agreements on unsure footing in California. At worst, it maximizes the opportunity for an anti-arbitration court to invalidate such an agreement, thus leaving an employer exposed to the very type of costly, acrimonious court litigation it sought to avoid by imposing arbitration in the first place.

The challenge faced by employers is evident when one examines the language of arbitration agreements often found by California courts to be both procedurally and substantively unconscionable. As noted, the California Supreme Court in *Carmona* ruled that a carve-out contained in the arbitration agreement that would have enabled the employer to seek immediate relief upon unauthorized disclosure of its confidential trade secrets or other sensitive business information – *including* pay rate and other information relating to its compensation systems and practices – was substantively unconscionable.

Employers have a strong interest in preserving their ability to obtain immediate relief from a court whenever the confidentiality of business plans, strategies and/or trade secrets is jeopardized. Public disclosure of such information likely would place the company at a significant competitive disadvantage as it seeks to recruit new talent, secure new business, or even retain existing clients. If this Court were to endorse the *Armendariz* doctrine, employers would be faced with an untenable choice between either (1) maintaining an arbitration agreement without a confidentiality carve-out – thus increasing (but not ensuring) the probability that the agreement will pass the conscionability test but losing any meaningful opportunity to mitigate damage stemming from a confidentiality breach – or (2) including a confidentiality carve-out in the agreement, which under *Armendariz* would virtually assure its invalidation.

California courts have relied on *Armendariz* even to justify invalidating arbitration agreements that are part (typically the last step) of a multi-step internal dispute resolution program designed primarily if not exclusively to detect and correct workplace issues before significant harm to the complaining employee or others occurs. Indeed, the *Carmona* court found that language in the agreement requiring employees "to discuss with the car wash companies 'any problems or concerns with anything related to' their employment before disclosing any information to outsiders, including attorneys, courts, or arbitration organizations" lacked mutuality, and thus further contributed to the agreement's unconscionability. 226 Cal. App. 4th at 89. It explained that while such a program "may present a laudable mechanism for resolving employment disputes informally ... it connotes a less benign goal. Given the unilateral nature of the

arbitration agreement, requiring plaintiff to submit to an employer-controlled dispute resolution mechanism (i.e., one without a neutral mediator) suggests that [the] defendant would receive a 'free peek' at plaintiff's case." *Id.* The court concluded that such a "unilateral 'free peek' provision contributes to the substantive unconscionability of an agreement that already lacks mutuality." *Id.* (footnote omitted).

B. California Businesses Already Face An Inhospitable Litigation Climate, Making The Anti-Arbitration Hostility Inherent In *Armendariz* Even More Troubling

The real risk that their arbitration agreements will be invalidated is especially unacceptable to businesses operating in California, where they already face significantly higher odds of having to defend against employment discrimination charges and lawsuits. In 2014, for instance, U.S. companies had, on average, an 11.4% chance of defending an employment discrimination claim. Hiscox, Inc., *2015 Guide to Employee Lawsuits*.[2] California employers faced a 40% higher risk than the national average, behind only three other states and the District of Columbia. *Id.*

In addition to the increased frequency of litigation activity, the speed and quality with which litigation is resolved in California leaves much to be desired. A recent study ranked California 47th out of 50 for the overall quality of its state liability systems, including factors such as judges' fairness (49th), competence

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[2] *Available at* http://www.hiscox.com/shared-documents/The-2015-Hiscox-Guide-to-Employee-Lawsuits-Employee-charge-trends-across-the-United-States.pdf (last visited Dec. 1, 2015).

(46th), and impartiality (45th), as well as the timeliness of summary judgment or dismissal (48th), overall treatment of tort and contract litigation (47th), and treatment of class action and mass consolidation suits (50th). U.S. Chamber Institute for Legal Reform, *2015 Lawsuit Climate Survey: Ranking the States* (Sept. 10, 2015).[3]

"[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi*, 473 U.S. at 626-27. This outmoded hostility is particularly misplaced in the employment context, where arbitration offers significant advantages to both employers and employees. "[F]or parties to employment contracts ... there are real benefits to the enforcement of arbitration provisions." *Circuit City Stores, Inc. v. Adams*, 532 U.S. at 122-23. As this Court observed in *Circuit City*:

> We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. Arbitration agreements allow the parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.

Id. at 123 (citation omitted). Indeed:

> The time and cost of pursuing a claim through traditional methods of litigation present the

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[3] *Available at* http://www.instituteforlegalreform.com/uploads/sites/1/ILR15077-HarrisReport_BF2.pdf (last visited Dec. 1, 2015)

> most glaring and formidable obstacles to relief for employment discrimination victims. While it might not make a difference to the upper level managerial worker who can afford the services of an expensive lawyer, and who can withstand the grueling process of litigation, those employees who are less financially sound are chronically unable to attract the services of a quality lawyer. For example, experienced litigators maintain that good plaintiff's attorneys will accept only one in a hundred discrimination claimants who seek their help. For those claimants who are denied the services because of their financial situation, the simpler, cheaper process of arbitration is the most feasible recourse.

Craig Hanlon, *Reason Over Rhetoric: The Case for Enforcing Pre-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 5 Cardozo J. Conflict Resol. 2 (2003).

Despite all the tangible benefits of employment arbitration, decisions like the one below will only make it less likely that employers will retain arbitration programs in California, imposing significant potential hardships on many workers whose *only* realistic access to justice is through arbitration. If employees with small individualized claims do not have access to simplified, low-cost arbitration and are forced into court, they could be priced out of the judicial system entirely. And it is not just employees with disputes who benefit from arbitration. The lower cost of dispute resolution reduces the costs of doing business, which manifests in lower prices for consumers and higher wages for employees. *See, e.g.*, Stephen Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001

J. Disp. Resol. 89, 91 (2001); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. Legal Stud. 1, 5-7 (Jan. 1995).

If *Armendariz* is allowed to stand, employers are all but assured that their predispute agreements to arbitrate, which often are offered as a condition of initial or continued employment, will be deemed unenforceable in California, contrary to this Court's rationale in *Concepcion*. Consequently, employees and employers would lose the well-recognized benefits of arbitration, including "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Concepcion*, 563 U.S. at 348. Such an outcome would significantly undercut the strong federal policy, as embodied in the FAA and repeatedly endorsed by this Court, favoring private arbitration of employment disputes.

CONCLUSION

For the foregoing reasons, the *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision below should be reversed.

Respectfully submitted,

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Supreme Court of the United States

MHN GOVERNMENT SERVICES, INC., et al.,

Petitioners,

v.

THOMAS ZABOROWSKI, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

The Federal Arbitration Act (FAA) provides that an arbitration agreement shall be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2. California law applies one rule of contract severability to contracts in general, and a separate rule of contract severability to agreements to arbitrate. The arbitration-only rule disfavors arbitration and applies even when the agreement contains an express severability clause. Its application in this case conflicts with binding precedent of this Court and with opinions of four other courts of appeals.

The question presented is whether California's arbitration-only severability rule is preempted by the FAA.

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Thomas, Paul, Note, *Conscionable Judging: A Case Study of How California Courts' Grapple with Challenges to Mandatory Arbitration Agreements*, 62 Hastings L.J. 1065 (2011) 19

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Petitioner, MHN Government Services, Inc.[1] Founded in 1973, Pacific Legal Foundation (PLF) is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases in this Court, the California courts and many other state supreme courts involving the Federal Arbitration Act (FAA) and contractual arbitration in general. *See, e.g.*, *DIRECTV v. Imburgia*, No. 14-462 (pending); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899 (2015); *Iskanian v. CLS Transp.*, 59 Cal. 4th 348 (2014), *cert. denied*, 135 S. Ct. 1155 (2015); *Gentry v. Superior Court (Circuit City Stores, Inc.)*, 42

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Cal. 4th 443 (2007). PLF supported the petition for writ of certiorari in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

MHN Government Services, Inc. is a private company that runs a healthcare-consulting business and employs graduate-school-educated healthcare workers. Pet. App. 12a-13a. The employees claim they were misclassified as independent contractors rather than employees, and that they were consequently deprived of overtime pay in violation of federal and state laws. Pet. App. 13a. Despite their employment contracts' arbitration agreement, a putative class of employees sued the company in federal court. MHN moved to compel the workers to resolve their claims in arbitration. *Id.* The employees argued that multiple provisions of the agreement were unconscionable. The district court agreed with them as to five discrete provisions ancillary to the basic underlying agreement to arbitrate: a shortened 6-month limitations period; waiver of punitive damages; a $2600 filing fee; a fee-shifting clause that awards attorneys' fees to the prevailing party; and an arbitrator-selection clause that allowed the employer to unilaterally choose a pool of three arbitrators from which the employee could then select its choice of arbitrator. Pet. App. 20a-28a. Under the California Supreme Court decision in *Armendariz v. Found. Health Psychcare Svcs., Inc.*, 24 Cal. 4th 83, 124 (2000), if a court finds "more than one unlawful provision" in an arbitration agreement to be unconscionable, it will deny severance and refuse to enforce the agreement in its entirety. Applying this principle, the Ninth Circuit Court of Appeals declined

to sever the offensive provisions, and instead invalidated the entire agreement. Pet. App. 5a.

In the general contractual context, a court applying California law can withhold severance only if it finds, after a fact-intensive provision-by-provision analysis, that the unconscionable provisions truly permeate and infect the entirety of the contract. The court below applied the *Armendariz* severance rule: that a court should refuse to sever unconscionable provisions in an arbitration agreement, whether or not the offensive provisions permeate and infect the entirety of the contract. In so doing, it applies severance doctrine contrary to state statutes that permit severance of multiple discrete provisions, and disfavors arbitration agreements by facilitating invalidation of entire arbitration agreements. In *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. at 1747, this Court held that the FAA preempts state-law rules that treat arbitration agreements less favorably than other contracts, or even have a "disproportionate impact on arbitration agreements." Judge Gould correctly would have held the *Armendariz* severance rule preempted by the FAA under *Concepcion*, severed the offensive provisions, and held the parties to their contractual agreement to arbitrate. Pet. App. 8a, 11a.

This Court should now explicitly hold that *Armendariz* was abrogated by *Concepcion*. *Armendariz*'s approach to severability of provisions in arbitration contracts is uniquely adverse compared to general state contract law of severability, in violation of the federal substantive law of arbitration and the Federal Arbitration Act, both of which require that arbitration contracts be considered on an equal footing to all other contracts. By refusing to sever invalid

provisions in favor of striking down arbitration contracts in their entirety, the Ninth Circuit, applying California law, defeats parties' legitimate expectations of arbitral resolution of disputes, thus harming the rule of law. The violation of the parties' intent is particularly acute where, as here, the contract contains a severability clause.

The severability rule also implicates another aspect of *Armendariz*, with which it works in concert. The severance rule requires California courts to invalidate an arbitration contract if there are two (or more) unconscionable provisions. Compounding the effect of this rule is that in many cases, one of the two "unconscionable" aspects of the contract is a "lack of mutuality," a California contract doctrine (explicitly rejected by most other states) that *Armendariz* requires be employed almost exclusively to arbitration contracts. The California courts demand that arbitration contracts—but not other contracts—have "mutual" provisions such that both parties stand in precise equivalence. A lack of mutuality is deemed unconscionable, and thus provides the first strike against an arbitration contract. Under *Armendariz*, one strike is all the contracting parties get. If any other provision is found unconscionable, the *Armendariz* "permeation" rule requires that the arbitration contract be invalidated in its entirety.

The decision below should be reversed.

ARGUMENT

I

THE *ARMENDARIZ* SEVERABILITY RULE DISFAVORS ARBITRATION CONTRACTS

A. The Federal Arbitration Act Mandates That Arbitration Contracts Stand on an Equal Footing with Other Contracts

Congress enacted the Federal Arbitration Act, 9 U.S.C. §§ 1-16, to overcome judicial resistance to arbitration and the savings clause of Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Applying this federal substantive law to the states, courts must construe arbitration contracts the same as any other contract, not subject it to more stringent review or disfavor because the subject matter is arbitration. *Id.*, confirming the holding of *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

The liberal interpretation of arbitration contracts is based on the freedom of competent adults to make their own decisions as to how to resolve disputes. *Concepcion*, 131 S. Ct. at 1745, 1749; *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (the Arbitration Act manifested "congressional desire to enforce agreements into which parties had entered"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) ("The 'liberal federal policy favoring arbitration agreements' . is at bottom a policy guaranteeing the enforcement of private

contractual arrangements."). The FAA preempts state law that "conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). As such, courts must "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *Concepcion*, 131 S. Ct. at 1745 (citations omitted).

The FAA's preemptive effect extends to grounds that generally exist "at law or in equity for the revocation of any contract[]" when those grounds "have been applied in a fashion that disfavors arbitration." *Id.* at 1747 (emphasis added). Thus, it does not allow courts to fashion contract law principles that "stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 1748. That is, a court may not "decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

California's general rule of contract law governing severability is that an invalid provision will be severed unless the invalidity "permeates" the entire contract, rendering it unlawful. Cal. Civ. Code § 1670.5 ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."); Cal. Civ. Code § 1599 ("Where a contract has several distinct objects, of which one at least is lawful, and one at least is

unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest."). *See also Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119, 137 (1998) (relying on Section 1599 to sever invalid portions of lawyers' fee agreement). In *Dotson v. Amgen, Inc.*, 181 Cal. App. 4th 975, 986 (2010), the California Court of Appeal held that "[a]lthough 'the statutes appear to give a trial court discretion as to whether to sever or restrict the unconscionable provision or whether to refuse to enforce the entire agreement[,] it also appears to contemplate the latter course *only* when an agreement is 'permeated' by unconscionability.' " (Emphasis added; citations omitted).

As shown below, ordinary contracts not involving arbitration often have one or more unconscionable provisions severed; in such contracts there is no apparent presumption that more than one invalid or unconscionable provision so "permeates" the contract to render the entire contract void. But arbitration contracts are uniquely analyzed under *Armendariz*: whenever there is simply more than one unconscionable provision in an arbitration contract, that unconscionability is presumed to permeate the entire contract, with the result that California courts invalidate the entirety of many arbitration contracts, instead of just the offending provisions. So long as an arbitration contract contains only a single unconscionable provision, California courts sever the offending provision and uphold the rest of the contract. *Armendariz* established the rule, however, that if more than one of these otherwise severable provisions exist in a single contract, unconscionability is deemed to permeate the agreement, rendering it fully invalid and unenforceable. 24 Cal. 4th at 124, cited in Pet. App. at

5a. The *Armendariz* court voiced the concern that it is not for the court to rewrite the contract for the parties. 24 Cal. 4th at 125. But "[p]artial enforcement [of a contract term] involves much less of a variation from the effects intended by the parties than total non-enforcement would." Arthur L. Corbin, *A Comment on Beit v. Beit*, 23 Conn. B.J. 43, 50 (1949), quoted in Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 Stan. L. Rev. 869, 893 (2011). Disregarding this policy, the *Armendariz* bright-line rule stands as an obstacle to normal rules governing severance of invalid contract terms.

B. The *Armendariz* Rule That Multiple Discrete Provisions Necessarily Permeate a Contract Uniquely, and Adversely, Affects Arbitration Contracts

The key to *Armendariz*'s rule is its presumption that more than one invalid provision "permeates" an arbitration contract. The "permeated" language is important, because it distinguishes between invalid provisions that can be lined out without altering the basic agreement between the parties and invalid provisions that infect every essential provision, such that lining them out fundamentally alters the contract. None of the California arbitration cases actually define "permeate." However, in different contexts, California-based courts have defined the word to mean "to be diffused throughout," *People v. Bautista*, 115 Cal. App. 4th 229, 236 n.4 (2004), and "cannot be discretely separated from [the] whole." *In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management)*, 357 F.3d 900, 910 (9th Cir. 2004). These decisions recognize that permeation does not

depend solely on the size or quantity of the offending elements, but rather on the extent to which they affect every other aspect of the whole.[2]

The *Armendariz* decision reflects the court's hostility to arbitration by presuming that more than one unconscionable provision per se permeates the entire agreement, requiring that the agreement be invalidated in its entirety. 24 Cal. 4th at 124. While permitting severance of a single, discrete invalid provision, *Armendariz* offers no logical justification (beyond the presumption of permeation) for refusing to sever two, three, or more provisions, if the subject matter of those provisions are *also* sufficiently discrete from the primary subject of the contract. *See Spinetti v. Service Corp. Int'l*, 324 F.3d 212, 214 (3d Cir. 2003) (severing multiple provisions to uphold an arbitration contract, noting "You don't cut down the trunk of a tree because some of its branches are sickly.").

As the law of arbitration has evolved, California courts have identified many types of provisions as unconscionable and severed them, so long as no more than one provision is unconscionable:

For example, an attorneys' fee shifting provision was held unconscionable and severed from the contract. *See, e.g., Serpa v. California Surety*

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[2] Analogously, in the context of criminal cases, a constitutional "structural error" is one that "permeate[s] '[t]he entire conduct of the trial from beginning to end,' or 'affect[s] the framework within which the trial proceeds.'" *Rice v. Wood*, 77 F.3d 1138, 1141 (9th Cir. 1996). Because they require automatic reversal (the equivalent of striking down an entire arbitration contract), structural errors that permeate the entire proceeding are held to occur in only a "very limited class of cases." *Johnson v. United States*, 520 U.S. 461, 468 (1997).

Investigations, Inc., 215 Cal. App. 4th 695, 710 (2013) (offending attorney fee provision severed as "plainly collateral to the main purpose of the contract" and remainder of arbitration agreement enforced).

Costs provisions have been held unconscionable and severed from the contract. *See, e.g., Gutierrez v. Autowest, Inc.*, 114 Cal. App. 4th 77, 92 (2003) (severing costs provision and enforcing the balance of the arbitration agreement; the central purpose of the contract "was not to regulate costs, but to provide a mechanism to resolve disputes [and] [b]ecause the costs provision is collateral to that purpose, severance was available.").

Unilateral appeal provisions have been held unconscionable and severed from the contract. *See, e.g., Little v. Auto Steigler, Inc.*, 29 Cal. 4th 1064, 1075-76 (2003).

A provision limiting discovery may be held unconscionable and severed from an otherwise valid arbitration contract. *See, e.g., Dotson*, 181 Cal. App. 4th at 985.

There is no logical reason why each of these provisions is described as discrete and collateral to the main objective of the contract in isolation, but the same discrete and collateral provisions in combination are deemed to permeate every aspect of a contract.

The *Armendariz* more-than-one permeability rule serves as nothing more than a fiction designed to invalidate arbitration contracts, a fact illuminated by the willingness of federal courts to routinely sever more than one unconscionable provision without finding a permeability problem. Demonstrating that the *Armendariz* rule unnecessarily invalidated

arbitration contracts, several district court decisions refuse to apply the bright-line rule that more-than-one unconscionable provision equals permeation by assessing whether the unconscionable provisions are, in fact, central to the arbitration contract and affect all facets. If discrete provisions can be severed without harming the parties' general intent to resolve disputes in arbitration, the district courts sever those provisions. For example, in *Lucas v. Gund, Inc.*, 450 F. Supp. 2d 1125, 1134 (C.D. Cal. 2006), the district court cited *Armendariz* but relied on the language of Cal. Civil Code § 1670.5 to sever two discrete, unconscionable provisions (one involving costs and fees; the other mandating New Jersey as the location for the arbitration). *See also, Ambler v. BT Americas Inc.*, 964 F. Supp. 2d 1169, 1177 (N.D. Cal. 2013) (severing two provisions relating to cost-splitting and attorneys' fees and otherwise enforcing the arbitration contract); *Silicon Valley Self Direct, LLC v. Paychex, Inc.*, 2015 WL 4452373, *7 (N.D. Cal. July 20, 2015) (severing damages waiver provision and forum selection clause to otherwise uphold an arbitration agreement).

Similarly, a district court severed three provisions—relating to carve-outs for injunctive and equitable relief, confidentiality, and attorneys' fees—and upheld an otherwise valid arbitration agreement. *Grabowski v. Robinson*, 817 F Supp. 2d 1159, 1179 (S.D. Cal. 2011) (arbitration agreement was not "permeated by unconscionability," notwithstanding the three discrete, unconscionable provisions). *See also Hwang v. J.P Morgan Chase Bank, N.A.*, No. CV 11-10782 PSG (JEMx), 2012 WL 3862338 (C.D. Cal. Aug. 16, 2012) (severed invalid fee-sharing and modification provisions because they were "collateral

to the agreements" and "would not amount to rewriting the agreements."); *Bencharsky v. Cottman Transmission Systems, LLC*, 625 F. Supp. 2d 872, 883 (N.D. Cal. 2008) (severing multiple provisions limiting the statute of limitations, barring punitive damages, and awarding equitable relief to only one party, while upholding the remainder of the arbitration agreement); *Cox v. Station Casinos, LLC*, 2014 WL 3747605, *5 (D. Nev. June 25, 2014) (severing provisions "concerning procedure, costs, and relief" because "collateral" to the main purpose of the employment contract that contained an arbitration clause).

As these federal cases demonstrate, courts can sever multiple discrete provisions without rewriting the arbitration contract. By doing so, courts validate the intent of the parties to resolve their disputes in an arbitral forum, consistent with the Federal Arbitration Act and the federal substantive law of arbitration. By contrast, the *Armendariz* rule that requires invalidation of arbitration contracts by aggressively refusing to sever multiple, discrete, unconscionable terms, uniquely disfavors arbitration contracts.

II

THE *ARMENDARIZ* RULE IMPROPERLY DISCOUNTS PARTIES' INTENT TO SEVER INVALIDATED PROVISIONS AND RETAIN THE OVERRIDING GOAL OF ARBITRATING DISPUTES

The contract between the parties in this case contains an express severability clause. Pet. App. at 54a. As a general matter, "[p]arties agreeing to a severance clause may agree to sever any invalid or unenforceable provision from a contract such that the

remainder of the contract is unaffected and enforceable as provided by law." *SI V, LLC v. FMC Corp.*, 223 F. Supp. 2d 1059, 1063 (N.D. Cal. 2002). The rule adopted by *Armendariz* not only ignores the parties' stated intent to arbitrate their disputes, but also disregards the parties' stated intent to proceed pursuant to what remains of the agreement if any provisions are invalidated. *See Estate of Deresh ex rel. Schneider v. FS Tenant Pool III Trust*, 95 So. 3d 296, 301 (Fla. Dist. Ct. App. 2012) (severing a punitive damages provision from an arbitration contract because "*[r]efusing* to sever the punitive damages limitation would cut out the heart of the agreement for a peripheral illegality."); *Zuver v. Airtouch Comm'ns, Inc.*, 153 Wash. 2d 293, 320 (2004) (excising confidentiality and remedies provisions from an arbitration contract but enforcing the remainder because "the parties have explicitly expressed their intent for us to do so by agreeing to a severance clause.").

As the Eighth Circuit explained, "[w]e do not believe that the severance of the provision limiting punitive damages diminishes [the claimant's] contractual intent to arbitrate because excluding the provision only allows her the opportunity to arbitrate her claims under more favorable terms than those to which she agreed." *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 682-83 (8th Cir. 2001); *see also Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 84 (D.C. Cir. 2005) (citing *Gannon*); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 675 (6th Cir. 2003) ("when the arbitration agreement at issue includes a severability provision, courts should not lightly conclude that a particular provision of an arbitration agreement taints the entire agreement."). Courts that sever unlawful

provisions pursuant to an agreed-upon severance clause "enhance[] the ability of the arbitration provision to function fully and adequately under the law." *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 (5th Cir. 2003).

The Washington Supreme Court's decision in *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wash. 2d 598 (2013), illustrates the difficulty of relying on numerical boundaries, *i.e.*, a set number of invalid provisions, to determine whether severability should apply, particularly when the agreement also contains a severance clause. In that case, the arbitration clause consisted of four sentences (plus the severance clause). The arbitration provisions read:

> All disputes or claims between the parties related to this Agreement shall be submitted to binding arbitration in accordance with the rules of [the] American Arbitration Association within 30 days from the dispute date or claim. Any arbitration proceedings brought by Client shall take place in Orange County, California. Judgment upon the decision of the arbitrator may be entered into any court having jurisdiction thereof. The prevailing party in any action or proceeding related to this Agreement shall be entitled to recover reasonable legal fees and costs, including attorney's fees which may be incurred.

The court held that the 30-day provision, the venue provision, and the loser-pays provision were unconscionable. *Id.* at 605-07. The court described this as invalidating three out of four sentences in the short arbitration clause, *id.* at 607, and held that 75%

invalidation left too little of consequence remaining for enforcement.

However, the court's three-out-of-four calculation does not accurately describe the effect of invaliding the unconscionable provisions. Had the court excised the offending provisions pursuant to the contract's severance clause, the arbitration clause would have required binding arbitration pursuant to the American Arbitration Association rules, the resulting decision of which could be entered into any appropriate court. While this seems bare bones, it suffices to indicate the parties' intent to arbitrate and incorporates a thorough set of rules under which the arbitration would proceed. Moreover, had the AAA Rules been spelled out rather than incorporated, those three invalidated provisions would have reflected a much tinier percentage of the whole. As a district court explained in nearly identical circumstances, "[a]lthough [defendant] inserted two clauses that appear to conflict with JAMS rules, simply severing those provisions or interpreting them as not applicable in California and proceeding under the incorporated JAMS rules cures the unconscionability as to those terms and preserves the intent of the Agreement." *Pope v. Sonatype, Inc.*, 2015 WL 2174033, *6 (N.D. Cal. May 8, 2015).

Courts looking to shortcut the analysis of whether unconscionable provisions "permeate" a contract—by simply counting the provisions—do a disservice to the parties' intent. *See Parilla v. IAP Worldwide Services, VI, Inc.*, 368 F.3d 269, 289 (3d Cir. 2004) ("[S]everability requires more than a count of the unconscionable provisions."). *Armendariz* requires just this simplistic approach, with the result that California courts routinely invalidate arbitration contracts in

their entirety rather than severing unconscionable provisions, an approach at odds with California courts willingness to sever provisions from non-arbitration contracts. Because this uniquely adverse affect on arbitration contracts violates the Federal Arbitration Act and the federal substantive law of arbitration, the *Armendariz* severability rule should be abrogated.

III

THE *ARMENDARIZ* RULE UNIQUELY AND ADVERSELY AFFECTS ARBITRATION CONTRACTS BY ITS APPLICATION OF THE MUTUALITY DOCTRINE

California courts increase the number of provisions deemed unconscionable by employing several doctrines holding arbitration contracts to different and higher standards than other contracts. A prime example is mutuality. As shown below, in California, mutuality is a major factor in determining whether an agreement is "permeated" with unconscionability. California courts demand mutuality *only* with regard to arbitration contracts, not other types of contracts. *Cf. Berent v. CMH Homes, Inc.*, 466 S.W.3d 740, 752 (Tenn. 2015) ("We are mindful that lack of mutuality of remedies in a contract is a type of 'one-sidedness' that is likely peculiar to arbitration agreements.").

A. *Armendariz*'s Mutuality Test Applies to All Arbitration Contracts in California

The "mutuality test" first appeared in *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519 (1997), which held that a contract that requires one party to arbitrate but not the other is so "one-sided" as to be unconscionable. *Id.* at 1532. The *Stirlin* court repeatedly labeled the contract between the parties as a "contract of adhesion" (an element of unconscionability), implicitly contradicting earlier California law by assuming that the label would be dispositive of the legal issues. *Id.* at 1533; *see also Kinney v. United HealthCare Services, Inc.*, 70 Cal. App. 4th 1322, 1332 (1999) (invalidating "unilateral obligation to arbitrate"). Yet this disdain of adhesion contracts itself betrays a certain bias.

> "The contract of adhesion is a part of the fabric of our society. It should neither be praised nor denounced " That is because there are important advantages to its use despite its potential for abuse. These advantages include the fact that standardization of forms for contracts is a rational and economically efficient response to the rapidity of market transactions and the high costs of negotiations, and that the drafter can rationally calculate the costs and risks of performance, which contributes to rational pricing.

Goodwin v. Ford Motor Credit Co., 970 F Supp. 1007, 1015 (M.D. Ala. 1997) (citing *Roberson v. The Money Tree of Alabama, Inc.*, 954 F. Supp. 1519, 1526 n.6 & n.10 (M.D. Ala. 1997)).[3] *See also Concepcion*, 131 S. Ct.

at 1750 ("[T]he times in which consumer contracts were anything other than adhesive are long past."). Under the mutuality test, the court relies on its own speculation that the arbitral proceeding itself might impede a party's ability to obtain the requested relief. As the Ninth Circuit understood the California rule, "[w]here the party with stronger bargaining power has restricted the weaker party to the arbitral forum, but reserved for itself the ability to seek redress in either an arbitral or judicial forum, California courts have found a lack of mutuality supporting substantive unconscionability." *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1285 (9th Cir. 2006).

While expressing a purported concern for public policy, however, none of the advantages of arbitration

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[3] Richard Epstein explains why the "mutuality argument" cannot be a legitimate basis for declaring a contract unconscionable:

> A could not complain if B decided not to make him any offer at all; why then is he entitled to complain if B decides to make him *better off* by now giving him a choice when before he had none? If A does not like B's offer, he can reject it; but to allow him to first accept the agreement and only thereafter to force B to work at a price which B finds unacceptable is to allow him to resort (with the aid of the state) to the very form of duress that on any theory is prohibited. There is no question of "dictation" of terms where B refuses to accept the terms desired by A. There is every question of dictation where A can repudiate his agreement with B and hold B to one to which B did not consent; and that element of dictation remains even if A is but a poor individual and B is a large and powerful corporation. To allow that to take place is to indeed countenance an "inequality of bargaining power" between A and B, with A having the legal advantage as he is given formal legal rights explicitly denied B.

Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & Econ. 293, 297 (1975).

were even acknowledged by the California Supreme Court when it adopted the mutuality test in *Armendariz*, 24 Cal. 4th at 117, and announced that arbitration agreements must contain a "modicum of bilaterality." The effect was striking. In the first five years after *Armendariz*, more than two-thirds of the courts that invalidated arbitration provisions did so because the provisions lacked mutuality. Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 50-51 (2006); *see also* Michael Schneidereit, Note, *A Cold Night: Unconscionability as a Defense to Mandatory Arbitration Clauses in Employment Agreements*, 55 Hastings L.J. 987, 1002 (2004) ("[I]n *Armendariz*, the court honed California unconscionability law into a weapon that could be used against mandatory arbitration agreements."); Paul Thomas, Note, *Conscionable Judging: A Case Study of California Courts' Grapple with Challenges to Mandatory Arbitration Agreements*, 62 Hastings L.J. 1065, 1083 tbl.1, 1084 (2011) (the vast majority of unconscionability cases decided between 2005 and 2008 by the California Courts of Appeal—89 out of 119—challenged arbitration agreements, confirming that courts "applying California law are most likely discriminating against arbitration agreements in a manner that is preempted by the interpretation of the FAA advanced by the Supreme Court.").

The now-discredited *Discover Bank* decision also employed a form of the *Armendariz* mutuality test to strike down class-arbitration waivers, not because the language of the agreement lacked mutuality, but because of the court's view of how neutral language

might be applied in future disputes. In the court's view:

> [C]lass action or arbitration waivers are indisputably one-sided. "Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover [Bank], because credit card companies typically do not sue their customers in class action lawsuits."

Discover Bank v. Superior Court, 36 Cal. 4th 148, 161 (2005), *overruled by Concepcion*, 131 S. Ct. at 1753. Although some language in *Armendariz* suggests that lack of mutuality possibly could be justified by "business realities," *Armendariz*, 24 Cal. 4th at 117, California courts search in vain for a business reality sufficient to justify lack of mutuality in an arbitration agreement. Broome, 3 Hastings Bus. L.J. at 54 (citing Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 81 (2005)).[4] *See also* Thomas H. Riske, *No Exceptions: How the Legitimate Business Justification for Unconscionability Only Further*

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[4] Again demonstrating greater faithfulness to the Federal Arbitration Act than the California courts, some federal district courts, even when applying California law, will occasionally find that the mutuality requirement was met and uphold an arbitration agreement. *See Rutter v. Darden Rests., Inc.*, No. CV-08-6106, 2008 WL 4949043, *4-*9 (C.D. Cal. Nov. 18, 2008); *Ramirez-Baker v. Beazer Homes, Inc.*, 636 F. Supp. 2d 1008, 1021 (E.D. Cal. 2008).

Demonstrates California Courts' Disdain for Arbitration Agreements, 2008 J. Disp. Resol. 591, 602-04 (2008) (The supposed "business realities" exception to the mutuality test, which uses terminology associated with general contract law, but which has been factually impossible to successfully invoke, provides another illustration of how California courts hold arbitration agreements to a unique standard.). The mutuality test thus effectively functions as an immediate strike one of unconscionability

Equating mutuality with unconscionability violates the FAA because the rule applies only—and adversely—to arbitration contracts. Outside the arbitration context, California courts do not demand mutuality either. *See Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman*, 65 Cal. App. 4th 1469, 1488-89 (1998) (unilateral mortgage agreement upheld because "[w]here sufficient consideration is present, mutuality is not essential"); *Hillsman v. Sutter Cmty. Hosp.*, 153 Cal. App. 3d 743, 752 (1984) (upholding unilateral employment contract where consideration requirement is properly met; a "mutuality of obligation" is unnecessary). Thus, California's "mutuality" approach to determining substantive unconscionability in arbitration provisions differs from the standard used to analyze ordinary contractual provisions for unconscionability. This violates the FAA as much as the *Discover Bank* rule invalidated in *Concepcion*, and for the same reasons.[5]

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[5] Most jurisdictions reject a requirement of mutuality for arbitration agreements. *See, e.g., Ex Parte McNaughton*, 728 So. 2d 592, 598 (Ala.), *cert. denied*, 528 U.S. 818 (1999) (A mutuality approach relies on the "uniqueness of the concept of arbitration," "assigns a suspect status to arbitration agreements," and therefore

(continued...)

See Soto v. State Industrial Products, Inc., 642 F.3d 67, 76-77 (1st Cir. 2011) ("the FAA preempts Puerto Rico from imposing such a requirement applicable only to

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[5] (...continued)
"flies in the face of *Doctor's Associates*."); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3d Cir. 1999) ("[S]ubstantive federal law stands for the proposition that parties to an arbitration agreement need not equally bind each other with respect to an arbitration agreement if they have provided each other with consideration beyond the promise to arbitrate"); *In re Pate*, 198 B.R. 841, 844 (S.D. Ga. 1996) (same result under Georgia law); *Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 365 (S.C. 2001) ("[T]he doctrine of mutuality of remedy does not apply here. An agreement providing for arbitration does not determine te *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined."); *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. 2006) ("There is no reason to create a different mutuality rule in arbitration cases. Both parties to this contract exchanged consideration in this sale of a home. The contract will not be invalidated for lack of mutuality of obligation of the arbitration clause."); *Stenzel v. Dell, Inc.*, 870 A.2d 133, 144 (Me. 2005) ("[T]he agreement is not unconscionable because, even though the arbitration clause lacks mutuality of obligation, the underlying contract for the sale of Dell computers is supported by adequate consideration."); *In re Lyon Financial Servs., Inc.*, 257 S.W.3d 228, 233 (Tex. 2008); *Walther v. Sovereign Bank*, 386 Md. 412, 433 (Md. 2005); *McKenzie Check Advance of Miss., LLC v. Hardy*, 866 So. 2d 446, 453 (Miss. 2004). *See also* Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 Marq. L. Rev. 751, 781, 785, 787 (2014) (study of 20 states, 10 of which reject the unconscionability doctrine entirely, three that accept the unconscionability doctrine across the board for all types of contracts; two states that are willing to consider unconscionability arguments; and four states (Missouri, Nevada, New Mexico, and Illinois) that are "very sympathetic to unconscionability arguments, but only if the challenged provision is part of an arbitration agreement." Montana has an aberrational approach that focuses on reasonable expectations rather than unconscionability. *Id.* at 801.

arbitration provisions"); *Southeastern Stud & Components, Inc. v. American Eagle Design Build Studios, LLC*, 588 F.3d 963, 967 (8th Cir. 2009) (citing Supreme Court cases holding that the FAA preempts state laws that invalidate arbitration contracts on grounds applicable only to arbitration contracts).

In contrast to most state courts, the *Armendariz* demand that arbitration contracts—but not other contracts—contain mutual, reciprocal provisions adversely affects arbitration contracts throughout California.

B. *Armendariz* Bootstraps the Lack of Mutuality to Invalidate Entire Arbitration Contracts

The *Armendariz* severance rule requires California courts to invalidate an arbitration contract if there are two unconscionable provisions. *See, e.g, Trivedi v. Curexo Tech. Corp.*, 189 Cal. App. 4th 387, 398 (2010) ("At least two provisions were properly found to be substantively unconscionable, a circumstance considered by our Supreme Court to "permeate" the agreement with unconscionability."). Compounding the effect of this rule is that in many cases, one of the two "unconscionable" aspects of the contract is the "lack of mutuality" described above. The California courts demand that arbitration contracts—but not other contracts—have "mutual" provisions such that both parties stand in precise equivalence. A lack of mutuality is deemed unconscionable, and thus provides the first strike against an arbitration contract. *See* Arthur M. Kaufman and Ross M. Babbitt, *The Mutuality Doctrine in the Arbitration Agreements: The Elephant in the Road*, 22 Franchise L.J. 101, 104 (2002) ("Mutuality of

obligation is enjoying a different sort of renaissance in the arbitration context as a component of the unconscionability analysis.").

For example, in *Fitz v. NCR Corp.*, 118 Cal. App. 4th 702, 726-27 (2004), the arbitration agreement contained "two unlawful provisions: a limitation on discovery that does not provide the weaker party with sufficient opportunity to vindicate her claims, and a lack of mutuality whereby the stronger party has exempted from arbitration the very claims it is likely to bring against employees." The court concluded that this showed a systematic effort by the employer to impose arbitration on employee as inferior forum; and that, moreover, there was no single provision that could be stricken to remove the taint. *Id.* Similarly, in *Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638, 666 (2004), the court held that there were two unconscionable terms in the arbitration agreement: an illegal cost-sharing provision and a lack of mutuality regarding arbitrable claims. The court held that the combination demonstrated that the agreement was "permeated with illegality and unconscionability." *Id.* In short, the court relied on the principle established in *Armendariz* that while "a wide variety of attributes may affect the determination of substantive unconscionability. , the key factor is lack of mutuality."). *Id.* at 658.

It is well-established that there is "no such doctrine of complete mutuality under federal law." *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*, 585 F.2d 39, 47 n.15 (3d Cir. 1978). To the contrary, a contract may confer rights and obligations on one party that it does not confer on the other. Restatement (Second) of Contracts § 79 (1981) ("If the

requirement of consideration is met, there is no additional requirement of . . equivalence in the values exchanged."). This principle applies in the context of arbitration agreements. *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3d Cir. 1999) ("[P]arties to an arbitration agreement need not equally bind each other with respect to an arbitration agreement if they have provided each other with consideration beyond the promise to arbitrate."); *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634, 637 (7th Cir. 1999); *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373, 378 (4th Cir. 1998); *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 451-53 (2nd Cir. 1995) (mutuality of obligation or remedy not required if arbitration agreement supported by consideration)).

Most state courts considering the issue also reject the mutuality requirement. For example, in *Dan Ryan Builders, Inc. v. Nelson*, the West Virginia Supreme Court surveyed treatises, journals, and cases from numerous jurisdictions and "conclude[d] that the formation of a contract with multiple clauses only requires consideration for the entire contract, and not for each individual clause." It further noted that "the majority of courts conclude that the parties need not have separate consideration for the arbitration clause, or equivalent, reciprocal duties to arbitrate, so long as the underlying contract as a whole is supported by valuable consideration." 230 W Va. 281, 288-89 & n.10 (2012) (collecting cases). Similarly, the Missouri Supreme Court explained that the "mutuality of obligation" requirement is a "dead letter in contract law" and that there is "no reason to create a different mutuality rule in arbitration cases." *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. 2006). *See also Carter v. SSC Odin Operating Co., LLC*, 976

N.E.2d 344, 353 (Ill. 2012) (plaintiff's "promise to arbitrate, even if not met with a reciprocal promise to arbitrate by defendant, is nonetheless supported by consideration."); Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44 Brandeis L.J. 415, 453 (2006) ("[M]utuality is not required so long as the employer has provided the employee with some other type of consideration. [M]utuality problems are easy to avoid. The easiest way to ensure mutuality is to make the arbitration promises reciprocal [or by] making arbitration part of a larger contract[.]")

California's outlier rule on mutuality in itself disadvantages arbitration contracts, and doubles the effect of the similarly adverse severability rule. By doing so, it ignores all public policies favoring arbitration. As the Missouri Supreme Court explained in *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 787 (2014):

> [T]o find that there was no consideration for Ms. Baker's promise is to say that there was ***absolutely no*** benefit to Ms. Baker in being able to arbitrate whatever claims she may have against Bristol Care in the future **and** ***absolutely no*** cost to Bristol Care in obligating itself to that process and its results. These conclusions cannot be justified either by the fact that Ms. Baker has changed her mind about wanting to arbitrate her claims or by any lingering judicial hostility toward arbitration generally.

As this Court has recognized, there are multiple benefits to bilateral arbitration: "lower costs, greater efficiency and speed, and the ability to choose expert

adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 685 (2010) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution.")) (additional citations omitted).

The *Armendariz* doctrines, combining a demand for mutuality and a uniquely narrow approach to severability, ignore all these benefits. The anti-arbitration rules established in *Armendariz* contravene the Federal Arbitration Act and the federal substantive law of arbitration.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed, and this Court should explicitly abrogate the anti-arbitration doctrines established by the California Supreme Court in *Armendariz*.

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Respectfully submitted,

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